UNITED STATES REPORTS

VOLUME 413

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1972

JUNE 21 THROUGH JUNE 25, 1973
END OF TERM

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1975

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Stock Number 2801-00382

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Errata

16 Wall. 75, last line: "1823" should be "1825."

361 U. S. 460, line 15 of syllabus: "259 F. 2d 346, judgment modified." should be "259 F. 2d 346, judgment affirmed by an equally divided Court in No. 19 and modified in No. 18."

407 U. S. 963, line 9: "1" should be "I."

409 U. S. 949, No. 72–224, line 2: "47" should be "471."

411 U. S. 221, line 5: "[4.–2]" should be "[4.–1]."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

ELLIOTT L. RICHARDSON, Attorney General.*
ERWIN N. GRISWOLD, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.
EDWARD G. HUDON, Librarian.

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*Attorney General Richardson was presented to the Court on June 25, 1973 (see *post*, p. v).

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

PRESENTATION OF THE ATTORNEY GENERAL AND TRIBUTE TO THE SOLICITOR GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 25, 1973

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST.

Mr. Solicitor General Griswold presented the Honorable Elliot L. Richardson, Attorney General of the United States.

THE CHIEF JUSTICE said:

Mr. Attorney General, the Court welcomes you to the performance of the important duties which devolve upon you as the chief law officer of the Government, and as an officer of this Court. Your commission will be recorded with the Clerk.

THE CHIEF JUSTICE said:

The Court takes note that Solicitor General Griswold today makes his final appearance as the incumbent of that high office. He has served with distinction for nearly six years, one of the longest tenures since the office of Solicitor General was created more than 100 years ago.

On behalf of the Court, I wish to thank him for his services to the Court and wish him well in the years ahead. We include Mrs. Griswold in our good wishes for the future.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1972

GILLIGAN, GOVERNOR OF OHIO, ET AL. *v.* MORGAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71–1553. Argued March 19, 1973—Decided June 21, 1973

Respondents filed this action on behalf of themselves and all other students at a state university, claiming that during a period of civil disorder on the campus in May 1970, the National Guard, called by the Governor to preserve order, violated students' rights of speech and assembly and caused injury and death to some students. They sought injunctive relief to restrain the Governor in the future from prematurely ordering Guard troops to duty in civil disorders and an injunction to restrain Guard leaders from future violation of students' rights. They also sought a declaratory judgment that § 2923.55 of the Ohio Revised Code is unconstitutional. The District Court dismissed the suit on the ground that the complaint failed to state a claim upon which relief could be granted. The Court of Appeals affirmed the dismissal with respect to both injunctive relief against the Governor's "premature" employment of the Guard and the validity of the state statute, but held that the complaint stated a cause of action with respect to one issue, which was remanded to the District Court with directions to resolve the question whether there was and is "a pattern of training, weaponry and orders in the Ohio National Guard which . . . require . . . the use of fatal force in suppressing

civilian disorders when the total circumstances are such that nonlethal force would suffice to restore order . . . ." Since the complaint was filed, the named respondents have left the university; the officials originally named as defendants no longer hold offices in which they can exercise authority over the Guard; the Guard has adopted new and substantially different "use of force" rules; and the civil disorder training of Guard recruits has been revised. *Held:*

1. The case is resolved on the basis of whether the claims alleged in the complaint, as narrowed by the Court of Appeals' remand, are justiciable, rather than on possible mootness. Pp. 4–5.

2. No justiciable controversy is presented in this case, as the relief sought by respondents, requiring initial judicial review and continuing judicial surveillance over the training, weaponry, and standing orders of the National Guard, embraces critical areas of responsibility vested by the Constitution, see Art. I, § 8, cl. 16, in the Legislative and Executive Branches of the Government. Pp. 5–12.

456 F. 2d 608, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which POWELL, J., joined, *post*, p. 12. DOUGLAS, BRENNAN, STEWART, and MARSHALL, JJ., filed a dissenting statement, *post*, p. 12.

Thomas V. Martin, Assistant Attorney General of Ohio, argued the cause for petitioners. With him on the briefs was *William J. Brown,* Attorney General.

Michael E. Geltner argued the cause for respondents. With him on the briefs were *Leonard J. Schwartz, Melvin L. Wulf, Sanford Jay Rosen,* and *Joel M. Gora.*

Solicitor General Griswold argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General Wood, Robert E. Kopp, Robert W. Berry,* and *R. Kenly Webster.**

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*Briefs of *amici curiae* urging affirmance were filed by *David E. Engdahl* for the Law Revision Center, and by *Jack Greenberg,*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Respondents, alleging that they were full-time students and officers in the student government at Kent State University in Ohio, filed this action [1] in the District Court on behalf of themselves and all other students on October 15, 1970. The essence of the complaint is that, during a period of civil disorder on and around the University campus in May 1970, the National Guard, called by the Governor of Ohio to preserve civil order and protect public property, violated students' rights of speech and assembly and caused injury to a number of students and death to several, and that the actions of the National Guard were without legal justification. They sought injunctive relief against the Governor to restrain him in the future from prematurely ordering National Guard troops to duty in civil disorders and an injunction to restrain leaders of the National Guard from future violation of the students' constitutional rights. They also sought a declaratory judgment that § 2923.55 of the Ohio Revised Code [2] is unconstitutional. The District Court held that the complaint failed to state a claim upon which relief could be granted and dismissed the suit. The Court of Appeals [3] unanimously affirmed the District Court's dismissal with respect to injunctive relief against the Governor's "premature" employment of the Guard on future occasions and with respect to the

---

James M. Nabrit III, Charles Stephen Ralston, and *Drew S. Days III* for the NAACP Legal Defense and Educational Fund, Inc.

[1] The complaint was brought under 42 U. S. C. § 1983 with jurisdiction asserted under 28 U. S. C. § 1343 (3).

[2] This section provides that, under certain circumstances, law enforcement personnel who are engaged in suppressing a riot are "guiltless" for the consequences of the use of necessary and proper force. Ohio Rev. Code Ann. § 2923.55 (Supp. 1972).

[3] The opinion of the Court of Appeals is reported *sub nom. Morgan v. Rhodes,* 456 F. 2d 608 (CA6 1972).

validity of the state statute.[4] At the same time, however, the Court of Appeals, with one judge dissenting, held that the complaint stated a cause of action with respect to one issue which was remanded to the District Court with directions to resolve the following question:

> "Was there and is there a pattern of training, weaponry and orders in the Ohio National Guard which singly or together require or make inevitable the use of fatal force in suppressing civilian disorders when the total circumstances at the critical time are such that nonlethal force would suffice to restore order and the use of lethal force is not reasonably necessary?" [5]

We granted certiorari to review the action of the Court of Appeals.[6]

I

We note at the outset that since the complaint was filed in the District Court in 1970, there have been a number of changes in the factual situation. At the oral argument, we were informed that none of the named respondents is still enrolled in the University.[7] Likewise, the officials originally named as party defendants no longer hold offices in which they can exercise any authority over the State's National Guard,[8] although the suit is against such parties and their successors in office. In addition, both the petitioners, and the Solicitor General appearing as *amicus curiae*, have informed us that since 1970 the Ohio National Guard has adopted new "use of force" rules substantially differing from those in

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[4] Respondents have not sought certiorari with respect to those claims.

[5] *Id.*, at 612.

[6] 409 U. S. 947 (1972).

[7] Tr. of Oral Arg. 25, 33.

[8] Memorandum of Petitioners Suggesting a Question of Mootness 2.

effect when the complaint was filed; we are also informed that the initial training of National Guard recruits relating to civil disorder control[9] has been revised.

Respondents assert, nevertheless, that these changes in the situation do not affect their right to a hearing on their entitlement to injunctive and supervisory relief. Some basis, therefore, exists for a conclusion that the case is now moot; however, on the record before us we are not prepared to resolve the case on that basis and therefore turn to the important question whether the claims alleged in the complaint, as narrowed by the Court of Appeals' remand, are justiciable.

II

We can treat the question of justiciability on the basis of an assumption that respondents' claims, within the framework of the remand order, are true and could be established by evidence. On that assumption, we address the question whether there is any relief a District Court could appropriately fashion.

It is important to note at the outset that this is not a case in which damages are sought for injuries sustained during the tragic occurrence at Kent State. Nor is it an action seeking a restraining order against some specified and imminently threatened unlawful action. Rather, it is a broad call on judicial power to assume continuing regulatory jurisdiction over the activities of the Ohio National Guard. This far-reaching demand for relief presents important questions of justiciability.

Respondents continue to seek for the benefit of all Kent State students a judicial evaluation of the appropriateness of the "training, weaponry and orders" of the Ohio

---

[9] In 1971, the Army began to give National Guard recruits 16 hours of additional special civil-disturbance-control training recognizing the peculiar role of the National Guard in this area.

National Guard. They further demand, and the Court of Appeals' remand would require, that the District Court establish standards for the training, kind of weapons and scope and kind of orders to control the actions of the National Guard. Respondents contend that thereafter the District Court must assume and exercise a continuing judicial surveillance over the Guard to assure compliance with whatever training and operations procedures may be approved by that court. Respondents press for a remedial decree of this scope, even assuming that the recently adopted changes are deemed acceptable after an evidentiary hearing by the court. Continued judicial surveillance to assure compliance with the changed standards is what respondents demand.

In relying on the Due Process Clause of the Fourteenth Amendment, respondents seem to overlook the explicit command of Art. I, § 8, cl. 16, which vests in Congress the power:

> "To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline *prescribed by Congress.*" (Emphasis added.)

The majority opinion in the Court of Appeals does not mention this very relevant provision of the Constitution. Yet that provision is explicit that the Congress shall have the responsibility for organizing, arming, and disciplining the Militia (now the National Guard), with certain responsibilities being reserved to the respective States. Congress has enacted appropriate legislation pursuant to Art. I, § 8, cl. 16,[10] and has also authorized the Presi-

[10] *E. g.*, 32 U. S. C. §§ 105, 501–507, 701–714 (1970 ed. and Supp. I).

dent—as the Commander in Chief of the Armed Forces—to prescribe regulations governing organization and discipline of the National Guard.[11] The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war. The Guard also may be federalized in addition to its role under state governments, to assist in controlling civil disorders.[12] The relief sought by respondents, requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry, and orders of the Guard, would therefore embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the Government.[13]

The Court of Appeals invited the District Court on remand to survey certain materials not then in the record of the case:

> "[F]or example: Prevention and Control of Mobs and Riots, Federal Bureau of Investigation, U. S. Dept. of Justice, J. Edgar Hoover (1967) . . . ; 32 C. F. R. § 501 (1971), 'Employment of Troops in Aid of Civil Authorities'; Instructions for Members of the Force at Mass Demonstrations, Police Department, City of New York (no date); Report of the National Advisory Commission on Civil Disorders (1968)." 456 F. 2d, at 614.

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[11] 32 U. S. C. § 110.

[12] 10 U. S. C. § 331 *et seq.*

[13] The initial and basic training of National Guard personnel is, by Regulation of the Department of the Army, pursuant to statutory authority, under federal jurisdiction. Commencing in 1971, National Guard units received, as part of the basic training, 16 hours of special civil-disturbance-control training, in recognition of the likelihood that the National Guard would be the primary source of military personnel called into civil disorder situations. See Dept. of the Army, Reserve Enlistment Program of 1963, CON Supp. 1 to AR350–1, App. XXV, Anx. F, Par. 3c (Aug. 31, 1972).

This would plainly and explicitly require a judicial evaluation of a wide range of possibly dissimilar procedures and policies approved by different law enforcement agencies or other authorities; and the examples cited may represent only a fragment of the accumulated data and experience in the various States, in the Armed Services, and in other concerned agencies of the Federal Government. Trained professionals, subject to the day-to-day control of the responsible civilian authorities, necessarily must make comparative judgments on the merits as to evolving methods of training, equipping, and controlling military forces with respect to their duties under the Constitution. It would be inappropriate for a district judge to undertake this responsibility in the unlikely event that he possessed requisite technical competence to do so.

Judge Celebrezze, in dissent, correctly read *Baker* v. *Carr*, 369 U. S. 186 (1962), when he said:

> "I believe that the congressional and executive authority to prescribe and regulate the training and weaponry of the National Guard, as set forth above, *clearly precludes any form of judicial regulation of the same matters.* I can envision no form of judicial relief which, if directed at the training and weaponry of the National Guard, would not involve a serious conflict with a
>
> " 'coordinate political department; . . . a lack of judicially discoverable and manageable standards for resolving [the question]; . . . the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; . . . an unusual need for unquestioning adherence to a

> political decision already made; [and] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.' Baker v. Carr, *supra,* 369 U. S. at 217 . . . . "*Any such relief,* whether it prescribed standards of training and weaponry or simply ordered compliance with the standards set by Congress and/or the Executive, *would necessarily draw the courts into a nonjusticiable political question, over which we have no jurisdiction.*" 456 F. 2d, at 619 (emphasis added).

In *Flast* v. *Cohen,* 392 U. S. 83 (1968), this Court noted that:

> "Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of only a political question, when the parties are asking for an advisory opinion, when the question sought to be adjudicated has been mooted by subsequent developments, and when there is no standing to maintain the action. Yet it remains true that '[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . .' *Poe* v. *Ullman,* 367 U. S. 497, 508 (1961)." [14]

In determining justiciability, the analysis in *Flast* thus suggests that there is no justiciable controversy (a) "when the parties are asking for an advisory opinion," (b) "when the question sought to be adjudicated has been mooted by subsequent developments," and

[14] 392 U. S., at 95 (footnotes omitted).

(c) "when there is no standing to maintain the action." As we noted in *Poe* v. *Ullman*, 367 U. S. 497 (1961), and repeated in *Flast*, "[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures . . . ." 367 U. S., at 508.

In testing this case by these standards drawn specifically from *Flast*, there are serious deficiencies with respect to each. The advisory nature of the judicial declaration sought is clear from respondents' argument and, indeed, from the very language of the court's remand. Added to this is that the nature of the questions to be resolved on remand are subjects committed expressly to the political branches of government. These factors, when coupled with the uncertainties as to whether a live controversy still exists and the infirmity of the posture of respondents as to standing, render the claim and the proposed issues on remand nonjusticiable.

It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches directly responsible—as the Judicial Branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; the majority opinion of the

Court of Appeals failed to give appropriate weight to this separation of powers.[15]

Voting rights cases such as *Baker* v. *Carr*, 369 U. S. 186 (1962), *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and prisoner rights cases such as *Haines* v. *Kerner*, 404 U. S. 519 (1972), are cited by the court as supporting the "diminish[ing] vitality of the political question doctrine." 456 F. 2d, at 613. Yet, because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise. The voting rights cases, indeed, have represented the Court's efforts to strengthen the political system by assuring a higher level of fairness and responsiveness to the political processes, not the assumption of a continuing judicial review of substantive political judgments entrusted expressly to the coordinate branches of government.

In concluding that no justiciable controversy is presented, it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific

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[15] In a colloquy with the Court on the scope of the relief sought under the remand, one Justice asked:

"Would it be a fair characterization of your position that if the case goes back to the district court, you do not quarrel with the specific [National Guard] regulations now in force but (a) you want them made permanent and, (b) you want a continuing surveillance to see that they are carried out; is that a fair statement of your case?"

Mr. Geltner, counsel for respondents, answered:

"Yes, Your Honor, that is a fair statement of what we are seeking at this point, understanding that at the time the complaint was filed we were seeking a more specific change in what then existed." Tr. of Oral Arg. 56.

unlawful conduct by military personnel,[16] whether by way of damages or injunctive relief. We hold only that no such questions are presented in this case. We decline to require a United States District Court to involve itself so directly and so intimately in the task assigned that court by the Court of Appeals. *Orloff* v. *Willoughby*, 345 U. S. 83, 93–94 (1953).

Reversed.

MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL dissent. For many of the reasons stated in Part I of the Court's opinion, they are convinced that this case is now moot. Accordingly, they would vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to dismiss it as moot. See *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE POWELL joins, concurring.

Respondents brought this action in 1970 seeking broad-ranging declaratory and injunctive relief. But the issue presently before the Court relates only to a portion of the relief sought in 1970. Under the Court of Appeals' remand order the District Court was limited in its review to determining the existence of a pattern of "training, weaponry and orders in the Ohio National Guard which

[16] See *Duncan* v. *Kahanamoku*, 327 U. S. 304 (1946); *Sterling* v. *Constantin*, 287 U. S. 378 (1932). In *Laird* v. *Tatum*, 408 U. S. 1, 15–16 (1972), we said: "[W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied."

singly or together require or make inevitable" the unjustifiable use of lethal force in suppressing civilian disorders. 456 F. 2d 608, 612. The Ohio use-of-force rules have now been changed, and are identical to the Army use-of-force rules. Counsel for respondents stated at oral argument that the use-of-force rules now in effect provide satisfactory safeguards against unwarranted use of lethal force by the Ohio National Guard. Tr. of Oral Arg. 31. And, as of 1971, special civil-disturbance-control training had been provided for the various National Guard units.

It is in this narrowly confined setting that we are asked to decide the issues presented in this case. Respondents have informed us that they seek no change in the current National Guard regulations; rather, they wish to assure their continuance through constant judicial surveillance of the orders, training, and weaponry of the Guard.

Were it not for the continuing surveillance respondents seek, I would have little difficulty concluding that the controversy is now moot. Except for that aspect of the case, all relief requested by respondents has been obtained. While one might argue that the likelihood of future changes in the rules is so attenuated that even the claim for continuing review by the District Court is moot, this issue need not be reached, as the District Court is clearly without power to grant the relief now sought.

Respondents' complaint rests upon a single, isolated, and tragic incident at Kent State University. The conditions that existed at the time of the incident no longer prevail. And respondents' complaint contains nothing suggesting that they are likely to suffer specific injury in the future as a result of the practices they challenge. See *Laird* v. *Tatum,* 408 U. S. 1, 14 (1972). A complaint based on a single past incident, containing allega-

tions of unspecified, speculative threats of uncertain harm that might occur at some indefinite time in the future, cannot support respondents' standing to maintain this action. See Complaint, par. 11, App. 5–6; *Roe* v. *Wade*, 410 U. S. 113, 128 (1973).

The relief sought by respondents, moreover, is beyond the province of the judiciary. Respondents would have the District Court, through continuing surveillance, evaluate and pass upon the merits of the Guard's training programs, weapons, use of force, and orders. The relief sought is prospective only; an evaluation of those matters in the context of a particular factual setting as a predicate to relief in the form of an injunction against continuing activity or for damages would present wholly different issues. This case relates to prospective relief in the form of judicial surveillance of highly subjective and technical matters involving military training and command. As such, it presents an "[inappropriate] . . . subject matter for judicial consideration," for respondents are asking the District Court, in fashioning that prospective relief, "to enter upon policy determinations for which judicially manageable standards are lacking." *Baker* v. *Carr*, 369 U. S. 186, 198, 226 (1962).

For these reasons the judgment of the Court of Appeals must be reversed. On the understanding that this is what the Court's opinion holds, I join that opinion.

Syllabus

MILLER *v.* CALIFORNIA

APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE

No. 70–73. Argued January 18–19, 1972—Reargued November 7, 1972—Decided June 21, 1973

Appellant was convicted of mailing unsolicited sexually explicit material in violation of a California statute that approximately incorporated the obscenity test formulated in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418 (plurality opinion). The trial court instructed the jury to evaluate the materials by the contemporary community standards of California. Appellant's conviction was affirmed on appeal. In lieu of the obscenity criteria enunciated by the *Memoirs* plurality, it is *held:*

1. Obscene material is not protected by the First Amendment. *Roth* v. *United States*, 354 U. S. 476, reaffirmed. A work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value. Pp. 23–24.

2. The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Roth*, *supra*, at 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary. Pp. 24–25.

3. The test of "*utterly* without redeeming social value" articulated in *Memoirs*, *supra*, is rejected as a constitutional standard. Pp. 24–25.

4. The jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community, and need not employ a "national standard." Pp. 30–34.

Vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 37. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 47.

Burton Marks reargued the cause and filed a brief for appellant.

Michael R. Capizzi reargued the cause for appellee. With him on the brief was *Cecil Hicks*.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called "the intractable obscenity problem." *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 704 (1968) (concurring and dissenting).

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. After a jury trial, he was convicted of violating California Penal Code § 311.2 (a), a misdemeanor, by knowingly distributing obscene matter,[1]

Samuel Rosenwein, A. L. Wirin, Fred Okrand, Laurence R. Sperber, Melvin L. Wulf, and *Joel M. Gora* filed a brief for the American Civil Liberties Union of Southern California et al. as *amici curiae* urging reversal.

[1] At the time of the commission of the alleged offense, which was prior to June 25, 1969, §§ 311.2 (a) and 311 of the California Penal Code read in relevant part:

"§ 311.2 Sending or bringing into state for sale or distribution; printing, exhibiting, distributing or possessing within state

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to dis-

and the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment without opinion. Appellant's conviction was spe-

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tribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. . . ."

"§ 311. Definitions

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

Section 311 (e) of the California Penal Code, *supra*, was amended on June 25, 1969, to read as follows:

"(e) 'Knowingly' means being aware of the character of the matter."

Cal. Amended Stats. 1969, c. 249, § 1, p. 598. Despite appellant's contentions to the contrary, the record indicates that the new § 311 (e) was not applied *ex post facto* to his case, but only the old § 311 (e) as construed by state decisions prior to the commission of the alleged offense. See *People* v. *Pinkus*, 256 Cal. App. 2d 941, 948–950, 63 Cal. Rptr. 680, 685–686 (App. Dept., Superior Ct., Los Angeles, 1967); *People* v. *Campise*, 242 Cal. App. 2d 905, 914, 51 Cal. Rptr. 815, 821 (App. Dept., Superior Ct., San Diego, 1966). Cf. *Bouie* v. *City of Columbia*, 378 U. S. 347 (1964). Nor did § 311.2, *supra*, as applied, create any "direct, immediate burden on the per-

cifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

The brochures advertise four books entitled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," and a film entitled "Marital Intercourse." While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material [2]

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formance of the postal functions," or infringe on congressional commerce powers under Art. I, § 8, cl. 3. *Roth* v. *United States*, 354 U. S. 476, 494 (1957), quoting *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 96 (1945). See also *Mishkin* v. *New York*, 383 U. S. 502, 506 (1966); *Smith* v. *California*, 361 U. S. 147, 150–152 (1959).

[2] This Court has defined "obscene material" as "material which deals with sex in a manner appealing to prurient interest," *Roth* v. *United States*, *supra*, at 487, but the *Roth* definition does not reflect the precise meaning of "obscene" as traditionally used in the English language. Derived from the Latin *obscaenus*, *ob*, to, plus *caenum*, filth, "obscene" is defined in the Webster's Third New International Dictionary (Unabridged 1969) as "1a: dis-

when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. *Stanley* v. *Georgia,* 394 U. S. 557, 567 (1969); *Ginsberg* v. *New York,* 390 U. S. 629, 637–643 (1968); *Interstate Circuit, Inc.* v. *Dallas, supra,* at 690; *Redrup* v. *New York,* 386 U. S. 767, 769 (1967); *Jacobellis* v. *Ohio,* 378 U. S. 184, 195 (1964). See *Rabe* v. *Washington,* 405 U. S. 313, 317 (1972) (BURGER, C. J., concurring); *United States* v. *Reidel,* 402 U. S. 351, 360–362 (1971) (opinion of MARSHALL, J.); *Joseph Burstyn, Inc.* v. *Wilson,* 343 U. S. 495, 502 (1952); *Breard* v. *Alexandria,* 341 U. S. 622, 644–645 (1951); *Kovacs* v. *Cooper,* 336 U. S. 77, 88–89 (1949); *Prince* v. *Massachusetts,* 321 U. S. 158, 169–170 (1944). Cf. *Butler* v. *Michigan,* 352 U. S. 380, 382–383 (1957); *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, 464–465 (1952). It is in this context that we are called

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gusting to the senses . . . b: grossly repugnant to the generally accepted notions of what is appropriate . . . 2: offensive or revolting as countering or violating some ideal or principle." The Oxford English Dictionary (1933 ed.) gives a similar definition, "[o]ffensive to the senses, or to taste or refinement; disgusting, repulsive, filthy, foul, abominable, loathsome."

The material we are discussing in this case is more accurately defined as "pornography" or "pornographic material." "Pornography" derives from the Greek (*pornè,* harlot, and *graphos,* writing). The word now means "1: a description of prostitutes or prostitution 2: a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement." Webster's Third New International Dictionary, *supra.* Pornographic material which is obscene forms a sub-group of all "obscene" expression, but not the whole, at least as the word "obscene" is now used in our language. We note, therefore, that the words "obscene material," as used in this case, have a specific judicial meaning which derives from the *Roth* case, *i. e.,* obscene material "which deals with sex." *Roth, supra,* at 487. See also ALI Model Penal Code § 251.4 (1) "Obscene Defined." (Official Draft 1962.)

on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

The dissent of MR. JUSTICE BRENNAN reviews the background of the obscenity problem, but since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured history of the Court's obscenity decisions. In *Roth* v. *United States*, 354 U. S. 476 (1957), the Court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious or filthy . . ." materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . . This is the same judgment expressed by this Court in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572:
>
> "'. . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. *These include the lewd and obscene . . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social*

> *value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .'* [Emphasis by Court in *Roth* opinion.]
>
> "We hold that obscenity is not within the area of constitutionally protected speech or press." 354 U. S., at 484–485 (footnotes omitted).

Nine years later, in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), the Court veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the *Roth* definition

> "as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Id.*, at 418.

The sharpness of the break with *Roth*, represented by the third element of the *Memoirs* test and emphasized by MR. JUSTICE WHITE'S dissent, *id.*, at 460–462, was further underscored when the *Memoirs* plurality went on to state:

> "The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be *utterly* without redeeming social value." *Id.*, at 419 (emphasis in original).

While *Roth* presumed "obscenity" to be "utterly without redeeming social importance," *Memoirs* required

that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value." Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test that called on the prosecution to prove a negative, *i. e.*, that the material was "*utterly* without redeeming social value"—a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Mr. Justice Harlan to wonder if the "*utterly* without redeeming social value" test had any meaning at all. See *Memoirs* v. *Massachusetts*, *id.*, at 459 (Harlan, J., dissenting). See also *id.*, at 461 (WHITE, J., dissenting); *United States* v. *Groner*, 479 F. 2d 577, 579–581 (CA5 1973).

Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. See, *e. g.*, *Redrup* v. *New York*, 386 U. S., at 770–771. We have seen "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S., at 704–705 (Harlan, J., concurring and dissenting) (footnote omitted).[3] This is not remarkable, for in the area

[3] In the absence of a majority view, this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. *Redrup* v. *New York*, 386 U. S. 767 (1967). Thirty-one cases have been decided in this manner. Beyond the necessity of circumstances, however, no justification has ever been offered in support of the *Redrup* "policy." See *Walker* v. *Ohio*, 398 U. S. 434–435 (1970) (dissenting opinions of BURGER, C. J., and Harlan, J.). The *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us.

of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage *Memoirs* test, *supra*. But now the *Memoirs* test has been abandoned as unworkable by its author,[4] and no Member of the Court today supports the *Memoirs* formulation.

II

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. *Kois* v. *Wisconsin*, 408 U. S. 229 (1972); *United States* v. *Reidel*, 402 U. S., at 354; *Roth* v. *United States*, *supra*, at 485.[5] "The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted]." *Breard* v. *Alexandria*, 341 U. S., at 642, and cases cited. See *Times Film Corp.* v. *Chicago*, 365 U. S. 43, 47–50 (1961); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S., at 502. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be

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[4] See the dissenting opinion of MR. JUSTICE BRENNAN in *Paris Adult Theatre I* v. *Slaton*, *post*, p. 73.

[5] As Mr. Chief Justice Warren stated, dissenting, in *Jacobellis* v. *Ohio*, 378 U. S. 184, 200 (1964):

"For all the sound and fury that the *Roth* test has generated, it has not been proved unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. No government—be it federal, state, or local—should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law, and we have attempted in the *Roth* case to provide such a rule."

carefully limited. See *Interstate Circuit, Inc.* v. *Dallas, supra,* at 682–685. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.[6] A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Kois* v. *Wisconsin, supra,* at 230, quoting *Roth* v. *United States, supra,* at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "*utterly* without redeeming social value" test of *Memoirs* v. *Massachusetts,*

[6] See, *e. g.,* Oregon Laws 1971, c. 743, Art. 29, §§ 255–262, and Hawaii Penal Code, Tit. 37, §§ 1210–1216, 1972 Hawaii Session Laws, Act 9, c. 12, pt. II, pp. 126–129, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.

We do not hold, as MR. JUSTICE BRENNAN intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. See *United States* v. *12 200-ft. Reels of Film, post,* at 130 n. 7.

383 U. S., at 419; that concept has never commanded the adherence of more than three Justices at one time.[7] See *supra*, at 21. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. See *Kois* v. *Wisconsin, supra*, at 232; *Memoirs* v. *Massachusetts, supra*, at 459–460 (Harlan, J., dissenting); *Jacobellis* v. *Ohio*, 378 U. S., at 204 (Harlan, J., dissenting); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 284–285 (1964); *Roth* v. *United States, supra*, at 497–498 (Harlan, J., concurring and dissenting).

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra:*

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can

[7] "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . . ." *Kois* v. *Wisconsin*, 408 U. S. 229, 231 (1972). See *Memoirs* v. *Massachusetts*, 383 U. S. 413, 461 (1966) (WHITE, J., dissenting). We also reject, as a constitutional standard, the ambiguous concept of "social importance." See *id.*, at 462 (WHITE, J., dissenting).

be exhibited or sold without limit in such public places.[8] At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. See *Kois* v. *Wisconsin, supra,* at 230–232; *Roth* v. *United States, supra,* at 487; *Thornhill* v. *Alabama,* 310 U. S. 88, 101–102 (1940). For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.[9]

MR. JUSTICE BRENNAN, author of the opinions of the Court, or the plurality opinions, in *Roth* v. *United States, supra; Jacobellis* v. *Ohio, supra; Ginzburg* v. *United*

[8] Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In *United States* v. *O'Brien,* 391 U. S. 367, 377 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and nonspeech elements to be "sufficiently justified if . . . it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." See *California* v. *LaRue,* 409 U. S. 109, 117–118 (1972).

[9] The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth* v. *United States,* 354 U. S., at 492 n. 30, "it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Cf. *Dunlop* v. *United States,* 165 U. S. 486, 499–500."

States, 383 U. S. 463 (1966), *Mishkin* v. *New York,* 383 U. S. 502 (1966); and *Memoirs* v. *Massachusetts, supra,* has abandoned his former position and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression, *Paris Adult Theatre I* v. *Slaton, post,* p. 73 (BRENNAN, J., dissenting). Paradoxically, MR. JUSTICE BRENNAN indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he finds the authority to distinguish between a willing "adult" one month past the state law age of majority and a willing "juvenile" one month younger.

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. See *Roth* v. *United States, supra,* at 491–492. Cf. *Ginsberg* v. *New York,* 390 U. S., at 643.[10] If

[10] As MR. JUSTICE BRENNAN stated for the Court in *Roth* v. *United States, supra,* at 491–492:

"Many decisions have recognized that these terms of obscenity statutes are not precise. [Footnote omitted.] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the

the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then "hard core" pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, MR. JUSTICE DOUGLAS contends. As to MR. JUSTICE DOUGLAS' position, see *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 379–380 (1971) (Black, J., joined by DOUGLAS, J., dissenting); *Ginzburg* v. *United States*, *supra*, at 476, 491–492 (Black, J., and DOUGLAS, J., dissenting); *Jacobellis* v. *Ohio*, *supra*, at 196 (Black, J., joined by DOUGLAS, J., concurring); *Roth*, *supra*, at 508–514 (DOUGLAS, J., dissenting). In this belief, however, MR. JUSTICE DOUGLAS now stands alone.

MR. JUSTICE BRENNAN also emphasizes "institutional stress" in justification of his change of view. Noting that "[t]he number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court," he quite rightly remarks that the examination of contested materials "is hardly a source of edification to the members of this Court." *Paris Adult*

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language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States* v. *Petrillo*, 332 U. S. 1, 7–8. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .' *Id.*, at 7. See also *United States* v. *Harriss*, 347 U. S. 612, 624, n. 15; *Boyce Motor Lines, Inc.* v. *United States*, 342 U. S. 337, 340; *United States* v. *Ragen*, 314 U. S. 513, 523–524; *United States* v. *Wurzbach*, 280 U. S. 396; *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497; *Fox* v. *Washington*, 236 U. S. 273; *Nash* v. *United States*, 229 U. S. 373."

Theatre I v. *Slaton, post,* at 92, 93. He also notes, and we agree, that "uncertainty of the standards creates a continuing source of tension between state and federal courts . . . ." "The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so." *Id.,* at 93, 92.

It is certainly true that the absence, since *Roth,* of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. Now we may abandon the casual practice of *Redrup* v. *New York,* 386 U. S. 767 (1967), and attempt to provide positive guidance to federal and state courts alike.

This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale—an absolutist, "anything goes" view of the First Amendment—because it will lighten our burdens.[11] "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." *Jacobellis* v. *Ohio, supra,* at 187–188 (opinion of BRENNAN, J.). Nor should we remedy "tension between state and federal courts" by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. See *Roth* v. *United States, supra,* at 482–485. "Our duty admits of no 'substitute for facing up

[11] We must note, in addition, that any assumption concerning the relative burdens of the past and the probable burden under the standards now adopted is pure speculation.

to the tough individual problems of constitutional judgment involved in every obscenity case.' [*Roth* v. *United States, supra,* at 498]; see *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 488 (opinion of Harlan, J.) [footnote omitted]." *Jacobellis* v. *Ohio, supra,* at 188 (opinion of BRENNAN, J.).

III

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our Nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists. When triers of fact are asked to decide whether "the average person, applying contemporary community standards" would consider certain materials "prurient," it would be unrealistic to require that the answer be based on some abstract formulation. The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers of fact to draw on the standards of their community, guided always by limiting instructions on the law. To require a State to structure obscenity proceedings around evidence of a *national* "community standard" would be an exercise in futility.

As noted before, this case was tried on the theory that the California obscenity statute sought to incorporate the tripartite test of *Memoirs.* This, a "national" standard of First Amendment protection enumerated by a plurality of this Court, was correctly regarded at the time of trial as limiting state prosecution under the controlling case

law. The jury, however, was explicitly instructed that, in determining whether the "dominant theme of the material as a whole . . . appeals to the prurient interest" and in determining whether the material "goes substantially beyond customary limits of candor and affronts contemporary community standards of decency," it was to apply "contemporary community standards of the State of California."

During the trial, both the prosecution and the defense assumed that the relevant "community standards" in making the factual determination of obscenity were those of the State of California, not some hypothetical standard of the entire United States of America. Defense counsel at trial never objected to the testimony of the State's expert on community standards [12] or to the instructions of the trial judge on "statewide" standards. On appeal to the Appellate Department, Superior Court of California, County of Orange, appellant for the first time contended that application of state, rather than national, standards violated the First and Fourteenth Amendments.

We conclude that neither the State's alleged failure to offer evidence of "national standards," nor the trial court's charge that the jury consider state community standards, were constitutional errors. Nothing in the First Amendment requires that a jury must consider hypothetical and unascertainable "national standards" when attempting to determine whether certain materials are obscene as a mat-

[12] The record simply does not support appellant's contention, belatedly raised on appeal, that the State's expert was unqualified to give evidence on California "community standards." The expert, a police officer with many years of specialization in obscenity offenses, had conducted an extensive statewide survey and had given expert evidence on 26 occasions in the year prior to this trial. Allowing such expert testimony was certainly not constitutional error. Cf. *United States* v. *Augenblick*, 393 U. S. 348, 356 (1969).

ter of fact. Mr. Chief Justice Warren pointedly commented in his dissent in *Jacobellis* v. *Ohio, supra,* at 200:

> "It is my belief that when the Court said in *Roth* that obscenity is to be defined by reference to 'community standards,' it meant community standards—not a national standard, as is sometimes argued. I believe that there is no provable 'national standard' . . . . At all events, this Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one."

It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.[13]

[13] In *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964), two Justices argued that application of "local" community standards would run the risk of preventing dissemination of materials in some places because sellers would be unwilling to risk criminal conviction by testing variations in standards from place to place. *Id.,* at 193–195 (opinion of BRENNAN, J., joined by Goldberg, J.). The use of "national" standards, however, necessarily implies that materials found tolerable in some places, but not under the "national" criteria, will nevertheless be unavailable where they are acceptable. Thus, in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single nationwide standard as in allowing distribution in accordance with local tastes, a point which Mr. Justice Harlan often emphasized. See *Roth* v. *United States,* 354 U. S., at 506.

Appellant also argues that adherence to a "national standard" is necessary "in order to avoid unconscionable burdens on the free flow of interstate commerce." As noted *supra,* at 18 n. 1, the application of domestic state police powers in this case did not intrude on any congressional powers under Art. I, § 8, cl. 3, for there is no indication that appellant's materials were ever distributed interstate. Appellant's argument would appear without substance in any event. Obscene material may be validly regulated by a State in the exercise of its traditional local power to protect the

See *Hoyt* v. *Minnesota*, 399 U. S. 524–525 (1970) (BLACKMUN, J., dissenting); *Walker* v. *Ohio*, 398 U. S. 434 (1970) (BURGER, C. J., dissenting); *id.*, at 434–435 (Harlan, J., dissenting); *Cain* v. *Kentucky*, 397 U. S. 319 (1970) (BURGER, C. J., dissenting); *id.*, at 319–320 (Harlan, J., dissenting); *United States* v. *Groner*, 479 F. 2d, at 581–583; O'Meara & Shaffer, Obscenity in The Supreme Court: A Note on *Jacobellis* v. *Ohio*, 40 Notre Dame Law. 1, 6–7 (1964). See also *Memoirs* v. *Massachusetts*, 383 U. S., at 458 (Harlan, J., dissenting); *Jacobellis* v. *Ohio*, *supra*, at 203–204 (Harlan, J., dissenting); *Roth* v. *United States*, *supra*, at 505–506 (Harlan, J., concurring and dissenting). People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made clear in *Mishkin* v. *New York*, 383 U. S., at 508–509, the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one. See *Roth* v. *United States*, *supra*, at 489. Cf. the now discredited test in *Regina* v. *Hicklin*, [1868] L. R. 3 Q. B. 360. We hold that the requirement that the jury evaluate the materials with reference to "contemporary

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general welfare of its population despite some possible incidental effect on the flow of such materials across state lines. See, *e. g.*, *Head* v. *New Mexico Board*, 374 U. S. 424 (1963); *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440 (1960); *Breard* v. *Alexandria*, 341 U. S. 622 (1951); *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525 (1949); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945); *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935); *Sligh* v. *Kirkwood*, 237 U. S. 52 (1915).

standards of the State of California" serves this protective purpose and is constitutionally adequate.[14]

IV

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a "misuse of the great guarantees of free speech and free press . . . ." *Breard* v. *Alexandria,* 341 U. S., at 645. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. "The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of

[14] Appellant's jurisdictional statement contends that he was subjected to "double jeopardy" because a Los Angeles County trial judge dismissed, before trial, a prior prosecution based on the same brochures, but apparently alleging exposures at a different time in a different setting. Appellant argues that once material has been found not to be obscene in one proceeding, the State is "collaterally estopped" from ever alleging it to be obscene in a different proceeding. It is not clear from the record that appellant properly raised this issue, better regarded as a question of procedural due process than a "double jeopardy" claim, in the state courts below. Appellant failed to address any portion of his brief on the merits to this issue, and appellee contends that the question was waived under California law because it was improperly pleaded at trial. Nor is it totally clear from the record before us what collateral effect the pretrial dismissal might have under state law. The dismissal was based, at least in part, on a failure of the prosecution to present affirmative evidence required by state law, evidence which was apparently presented in this case. Appellant's contention, therefore, is best left to the California courts for further consideration on remand. The issue is not, in any event, a proper subject for appeal. See *Mishkin* v. *New York,* 383 U. S. 502, 512–514 (1966).

political and social changes desired by the people," *Roth* v. *United States, supra,* at 484 (emphasis added). See *Kois* v. *Wisconsin,* 408 U. S., at 230–232; *Thornhill* v. *Alabama,* 310 U. S., at 101–102. But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.[15]

There is no evidence, empirical or historical, that the stern 19th century American censorship of public distribution and display of material relating to sex, see *Roth* v. *United States, supra,* at 482–485, in any way limited or affected expression of serious literary, artistic, political, or scientific ideas. On the contrary, it is beyond any question that the era following Thomas Jefferson to Theodore Roosevelt was an "extraordinarily vigorous period," not just in economics and politics, but in *belles lettres* and in "the outlying fields of social and political philosophies."[16] We do not see the harsh hand

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[15] In the apt words of Mr. Chief Justice Warren, appellant in this case was "plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect. I believe that the State and Federal Governments can constitutionally punish such conduct. That is all that these cases present to us, and that is all we need to decide." *Roth* v. *United States, supra,* at 496 (concurring opinion).

[16] See 2 V. Parrington, Main Currents in American Thought *ix et seq.* (1930). As to the latter part of the 19th century, Parrington observed "A new age had come and other dreams—the age and the dreams of a middle-class sovereignty . . . . From the crude and vast romanticisms of that vigorous sovereignty emerged eventually a spirit of realistic criticism, seeking to evaluate the worth of this new America, and discover if possible other philosophies to take the place of those which had gone down in the fierce battles of the Civil War." *Id.,* at 474. Cf. 2 S. Morison, H. Commager & W. Leuchtenburg, The Growth of the American Republic 197–233 (6th ed. 1969); Paths of American Thought 123–166, 203–290 (A. Schlesinger & M. White ed. 1963) (articles of Fleming, Lerner, Morton & Lucia White, E. Rostow, Samuelson, Kazin, Hofstadter); and H. Wish, Society and Thought in Modern America 337–386 (1952).

of censorship of ideas—good or bad, sound or unsound—and "repression" of political liberty lurking in every state regulation of commercial exploitation of human interest in sex.

MR. JUSTICE BRENNAN finds "it is hard to see how state-ordered regimentation of our minds can ever be forestalled." *Paris Adult Theatre I* v. *Slaton, post,* at 110 (BRENNAN, J., dissenting). These doleful anticipations assume that courts cannot distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material. Moreover, state regulation of hard-core pornography so as to make it unavailable to nonadults, a regulation which MR. JUSTICE BRENNAN finds constitutionally permissible, has all the elements of "censorship" for adults; indeed even more rigid enforcement techniques may be called for with such dichotomy of regulation. See *Interstate Circuit, Inc.* v. *Dallas,* 390 U. S., at 690.[17] One can concede that the "sexual revolution" of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation. But it does not follow that no regulation of patently offensive "hard core" materials is needed or permissible; civilized people do not allow unregulated access to heroin because it is a derivative of medicinal morphine.

In sum, we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated

[17] "[W]e have indicated . . . that because of its strong and abiding interest in youth, a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults. *Ginsberg* v. *New York,* . . . [390 U. S. 629 (1968)]." *Interstate Circuit, Inc.* v. *Dallas,* 390 U. S. 676, 690 (1968) (footnote omitted).

above, without a showing that the material is "*utterly* without redeeming social value"; and (c) hold that obscenity is to be determined by applying "contemporary community standards," see *Kois* v. *Wisconsin, supra,* at 230, and *Roth* v. *United States, supra,* at 489, not "national standards." The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion. See *United States* v. *12 200-ft. Reels of Film, post,* at 130 n. 7.

Vacated and remanded.

MR. JUSTICE DOUGLAS, dissenting.

I

Today we leave open the way for California [1] to send a man to prison for distributing brochures that advertise books and a movie under freshly written standards defining obscenity which until today's decision were never the part of any law.

The Court has worked hard to define obscenity and concededly has failed. In *Roth* v. *United States,* 354 U. S. 476, it ruled that "[o]bscene material is material which deals with sex in a manner appealing to prurient interest." *Id.,* at 487. Obscenity, it was said, was rejected by the First Amendment because it is "utterly without redeem-

[1] California defines "obscene matter" as "matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance." Calif. Penal Code § 311 (a).

ing social importance." *Id.*, at 484. The presence of a "prurient interest" was to be determined by "contemporary community standards." *Id.*, at 489. That test, it has been said, could not be determined by one standard here and another standard there, *Jacobellis* v. *Ohio*, 378 U. S. 184, 194, but "on the basis of a national standard." *Id.*, at 195. My Brother STEWART in *Jacobellis* commented that the difficulty of the Court in giving content to obscenity was that it was "faced with the task of trying to define what may be indefinable." *Id.*, at 197.

In *Memoirs* v. *Massachusetts*, 383 U. S. 413, 418, the *Roth* test was elaborated to read as follows: "[T]hree elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

In *Ginzburg* v. *United States*, 383 U. S. 463, a publisher was sent to prison, not for the kind of books and periodicals he sold, but for the manner in which the publications were advertised. The "leer of the sensualist" was said to permeate the advertisements. *Id.*, at 468. The Court said, "Where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity." *Id.*, at 470. As Mr. Justice Black said in dissent, ". . . Ginzburg . . . is now finally and authoritatively condemned to serve five years in prison for distributing printed matter about sex which neither Ginzburg nor anyone else could possibly have known to be criminal." *Id.*, at 476. That observation by Mr. Justice Black is underlined by the fact that the *Ginzburg* decision was five to four.

A further refinement was added by *Ginsberg* v. *New York,* 390 U. S. 629, 641, where the Court held that "it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."

But even those members of this Court who had created the new and changing standards of "obscenity" could not agree on their application. And so we adopted a *per curiam* treatment of so-called obscene publications that seemed to pass constitutional muster under the several constitutional tests which had been formulated. See *Redrup* v. *New York,* 386 U. S. 767. Some condemn it if its "dominant tendency might be to 'deprave or corrupt' a reader." [2] Others look not to the content of the book but to whether it is advertised " 'to appeal to the erotic interests of customers.' " [3] Some condemn only "hard-core pornography"; but even then a true definition is lacking. It has indeed been said of that definition, "I could never succeed in [defining it] intelligibly," but "I know it when I see it." [4]

Today we would add a new three-pronged test: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

Those are the standards we ourselves have written into the Constitution.[5] Yet how under these vague tests can

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[2] *Roth* v. *United States,* 354 U. S. 476, 502 (opinion of Harlan, J.).

[3] *Ginzburg* v. *United States,* 383 U. S. 463, 467.

[4] *Jacobellis* v. *Ohio,* 378 U. S. 184, 197 (STEWART, J., concurring).

[5] At the conclusion of a two-year study, the U. S. Commission on

we sustain convictions for the sale of an article prior to the time when some court has declared it to be obscene?

Today the Court retreats from the earlier formulations of the constitutional test and undertakes to make new definitions. This effort, like the earlier ones, is earnest and well intentioned. The difficulty is that we do not deal with constitutional terms, since "obscenity" is not mentioned in the Constitution or Bill of Rights. And the First Amendment makes no such exception from "the press" which it undertakes to protect nor, as I have said on other occasions, is an exception necessarily implied, for there was no recognized exception to the free press at the time the Bill of Rights was adopted which treated "obscene" publications differently from other types of papers, magazines, and books. So there are no constitutional guidelines for deciding what is and what is not "obscene." The Court is at large because we deal with tastes and standards of literature. What shocks me may

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Obscenity and Pornography determined that the standards we have written interfere with constitutionally protected materials:

"Society's attempts to legislate for adults in the area of obscenity have not been successful. Present laws prohibiting the consensual sale or distribution of explicit sexual materials to adults are extremely unsatisfactory in their practical application. The Constitution permits material to be deemed 'obscene' for adults only if, as a whole, it appeals to the 'prurient' interest of the average person, is 'patently offensive' in light of 'community standards,' and lacks 'redeeming social value.' These vague and highly subjective aesthetic, psychological and moral tests do not provide meaningful guidance for law enforcement officials, juries or courts. As a result, law is inconsistently and sometimes erroneously applied and the distinctions made by courts between prohibited and permissible materials often appear indefensible. Errors in the application of the law and uncertainty about its scope also cause interference with the communication of constitutionally protected materials." Report of the Commission on Obscenity and Pornography 53 (1970).

be sustenance for my neighbor. What causes one person to boil up in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. We deal here with a regime of censorship which, if adopted, should be done by constitutional amendment after full debate by the people.

Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. If a constitutional amendment authorized censorship, the censor would probably be an administrative agency. Then criminal prosecutions could follow as, if, and when publishers defied the censor and sold their literature. Under that regime a publisher would know when he was on dangerous ground. Under the present regime—whether the old standards or the new ones are used—the criminal law becomes a trap. A brand new test would put a publisher behind bars under a new law improvised by the courts after the publication. That was done in *Ginzburg* and has all the evils of an *ex post facto* law.

My contention is that until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. For no more vivid illustration of vague and uncertain laws could be designed than those we have fashioned. As Mr. Justice Harlan has said:

> "The upshot of all this divergence in viewpoint is that anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment." *Interstate Circuit, Inc.* v. *Dallas,* 390 U. S. 676, 707.

In *Bouie* v. *City of Columbia,* 378 U. S. 347, we upset a conviction for remaining on property after being asked to leave, while the only unlawful act charged by the statute was entering. We held that the defendants had received no "fair warning, at the time of their con-

duct" while on the property "that the act for which they now stand convicted was rendered criminal" by the state statute. *Id.*, at 355. The same requirement of "fair warning" is due here, as much as in *Bouie*. The latter involved racial discrimination; the present case involves rights earnestly urged as being protected by the First Amendment. In any case—certainly when constitutional rights are concerned—we should not allow men to go to prison or be fined when they had no "fair warning" that what they did was criminal conduct.

II

If a specific book, play, paper, or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows, or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does [6] and my views

[6] It is said that "obscene" publications can be banned on authority of restraints on communications incident to decrees restraining unlawful business monopolies or unlawful restraints of trade, *Sugar Institute* v. *United States*, 297 U. S. 553, 597, or communications respecting the sale of spurious or fraudulent securities. *Hall* v. *Geiger-Jones Co.*, 242 U. S. 539, 549; *Caldwell* v. *Sioux Falls Stock Yards Co.*, 242 U. S. 559, 567; *Merrick* v. *Halsey & Co.*, 242 U. S. 568, 584. The First Amendment answer is that whenever speech and conduct are brigaded—as they are when one shouts "Fire" in a crowded theater—speech can be outlawed. Mr. Justice Black, writing for a unanimous Court in *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, stated that labor unions could be restrained from picketing a firm in support of a secondary boycott which a State had validly outlawed. Mr. Justice Black said: "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now." *Id.*, at 498.

on the issue have been stated over and over again.[7] But at least a criminal prosecution brought at that juncture would not violate the time-honored void-for-vagueness test.[8]

No such protective procedure has been designed by California in this case. Obscenity—which even we cannot define with precision—is a hodge-podge. To send

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[7] See *United States* v. *12 200-ft. Reels of Film*, *post*, p. 123; *United States* v. *Orito*, *post*, p. 139; *Kois* v. *Wisconsin*, 408 U. S. 229; *Byrne* v. *Karalexis*, 396 U. S. 976, 977; *Ginsberg* v. *New York*, 390 U. S. 629, 650; *Jacobs* v. *New York*, 388 U. S. 431, 436; *Ginzburg* v. *United States*, 383 U. S. 463, 482; *Memoirs* v. *Massachusetts*, 383 U. S. 413, 424; *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 72; *Times Film Corp.* v. *Chicago*, 365 U. S. 43, 78; *Smith* v. *California*, 361 U. S. 147, 167; *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 697; *Roth* v. *United States*, 354 U. S. 476, 508; *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 446; *Superior Films, Inc.* v. *Department of Education*, 346 U. S. 587, 588; *Gelling* v. *Texas*, 343 U. S. 960.

[8] The Commission on Obscenity and Pornography has advocated such a procedure:

"*The Commission recommends the enactment, in all jurisdictions which enact or retain provisions prohibiting the dissemination of sexual materials to adults or young persons, of legislation authorizing prosecutors to obtain declaratory judgments as to whether particular materials fall within existing legal prohibitions* . . . .

"A declaratory judgment procedure . . . would permit prosecutors to proceed civilly, rather than through the criminal process, against suspected violations of obscenity prohibition. If such civil procedures are utilized, penalties would be imposed for violation of the law only with respect to conduct occurring after a civil declaration is obtained. The Commission believes this course of action to be appropriate whenever there is any existing doubt regarding the legal status of materials; where other alternatives are available, the criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for the threat of criminal sanctions might otherwise deter the free distribution of constitutionally protected material." Report of the Commission on Obscenity and Pornography 63 (1970).

men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process.

III

While the right to know is the corollary of the right to speak or publish, no one can be forced by government to listen to disclosure that he finds offensive. That was the basis of my dissent in *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451, 467, where I protested against making streetcar passengers a "captive" audience. There is no "captive audience" problem in these obscenity cases. No one is being compelled to look or to listen. Those who enter newsstands or bookstalls may be offended by what they see. But they are not compelled by the State to frequent those places; and it is only state or governmental action against which the First Amendment, applicable to the States by virtue of the Fourteenth, raises a ban.

The idea that the First Amendment permits government to ban publications that are "offensive" to some people puts an ominous gloss on freedom of the press. That test would make it possible to ban any paper or any journal or magazine in some benighted place. The First Amendment was designed "to invite dispute," to induce "a condition of unrest," to "create dissatisfaction with conditions as they are," and even to stir "people to anger." *Terminiello* v. *Chicago*, 337 U. S. 1, 4. The idea that the First Amendment permits punishment for ideas that are "offensive" to the particular judge or jury sitting in judgment is astounding. No greater leveler of speech or literature has ever been designed. To give the power to the censor, as we do today, is to make a sharp and radical break with the traditions of a free society. The First Amendment was not fashioned as a vehicle for

dispensing tranquilizers to the people. Its prime function was to keep debate open to "offensive" as well as to "staid" people. The tendency throughout history has been to subdue the individual and to exalt the power of government. The use of the standard "offensive" gives authority to government that cuts the very vitals out of the First Amendment.[9] As is intimated by the Court's opinion, the materials before us may be garbage. But so is much of what is said in political campaigns, in the daily press, on TV, or over the radio. By reason of the First Amendment—and solely because of it—speakers and publishers have not been threatened or subdued because their thoughts and ideas may be "offensive" to some.

The standard "offensive" is unconstitutional in yet another way. In *Coates* v. *City of Cincinnati*, 402 U. S. 611, we had before us a municipal ordinance that made it a crime for three or more persons to assemble on a street and conduct themselves "in a manner annoying to persons

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[9] Obscenity law has had a capricious history:

"The white slave traffic was first exposed by W. T. Stead in a magazine article, 'The Maiden Tribute.' The English law did absolutely nothing to the profiteers in vice, but put Stead in prison for a year for writing about an indecent subject. When the law supplies no definite standard of criminality, a judge in deciding what is indecent or profane may consciously disregard the sound test of present injury, and proceeding upon an entirely different theory may condemn the defendant because his words express ideas which are thought liable to cause bad future consequences. Thus musical comedies enjoy almost unbridled license, while a problem play is often forbidden because opposed to our views of marriage. In the same way, the law of blasphemy has been used against Shelley's *Queen Mab* and the decorous promulgation of pantheistic ideas, on the ground that to attack religion is to loosen the bonds of society and endanger the state. This is simply a roundabout modern method to make heterodoxy in sex matters and even in religion a crime." Z. Chafee, Free Speech in the United States 151 (1942).

passing by." We struck it down, saying: "If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.

"Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensive normative standard, but rather in the sense that no standard of conduct is specified at all." *Id.*, at 614.

How we can deny Ohio the convenience of punishing people who "annoy" others and allow California power to punish people who publish materials "offensive" to some people is difficult to square with constitutional requirements.

If there are to be restraints on what is obscene, then a constitutional amendment should be the way of achieving the end. There are societies where religion and mathematics are the only free segments. It would be a dark day for America if that were our destiny. But the people can make it such if they choose to write obscenity into the Constitution and define it.

We deal with highly emotional, not rational, questions. To many the Song of Solomon is obscene. I do not think we, the judges, were ever given the constitutional power to make definitions of obscenity. If it is to be defined, let the people debate and decide by a constitutional amendment what they want to ban as obscene and what standards they want the legislatures and the courts to apply. Perhaps the people will decide that the path towards a mature, integrated society requires

that all ideas competing for acceptance must have no censor. Perhaps they will decide otherwise. Whatever the choice, the courts will have some guidelines. Now we have none except our own predilections.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

In my dissent in *Paris Adult Theatre I* v. *Slaton, post,* p. 73, decided this date, I noted that I had no occasion to consider the extent of state power to regulate the distribution of sexually oriented material to juveniles or the offensive exposure of such material to unconsenting adults. In the case before us, appellant was convicted of distributing obscene matter in violation of California Penal Code § 311.2, on the basis of evidence that he had caused to be mailed unsolicited brochures advertising various books and a movie. I need not now decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that under my dissent in *Paris Adult Theatre I,* the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face.* "[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Gooding* v. *Wilson,* 405 U. S. 518, 521 (1972), quoting

*Cal. Penal Code § 311.2 (a) provides that "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

from *Dombrowski* v. *Pfister,* 380 U. S. 479, 486 (1965). See also *Baggett* v. *Bullitt,* 377 U. S. 360, 366 (1964); *Coates* v. *City of Cincinnati,* 402 U. S. 611, 616 (1971); *id.,* at 619–620 (WHITE, J., dissenting); *United States* v. *Raines,* 362 U. S. 17, 21–22 (1960); *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). Since my view in *Paris Adult Theatre I* represents a substantial departure from the course of our prior decisions, and since the state courts have as yet had no opportunity to consider whether a "readily apparent construction suggests itself as a vehicle for rehabilitating the [statute] in a single prosecution," *Dombrowski* v. *Pfister, supra,* at 491, I would reverse the judgment of the Appellate Department of the Superior Court and remand the case for proceedings not inconsistent with this opinion. See *Coates* v. *City of Cincinnati, supra,* at 616.

Syllabus

PARIS ADULT THEATRE I ET AL. *v.* SLATON, DISTRICT ATTORNEY, ET AL.

CERTIORARI TO THE SUPREME COURT OF GEORGIA

No. 71–1051. Argued October 19, 1972—Decided June 21, 1973

Respondents sued under Georgia civil law to enjoin the exhibiting by petitioners of two allegedly obscene films. There was no prior restraint. In a jury-waived trial, the trial court (which did not require "expert" affirmative evidence of obscenity) viewed the films and thereafter dismissed the complaints on the ground that the display of the films in commercial theaters to consenting adult audiences (reasonable precautions having been taken to exclude minors) was "constitutionally permissible." The Georgia Supreme Court reversed, holding that the films constituted "hard core" pornography not within the protection of the First Amendment. *Held:*

1. Obscene material is not speech entitled to First Amendment protection. *Miller* v. *California, ante,* p. 15; *Roth* v. *United States,* 354 U. S. 476. P. 54.

2. The Georgia civil procedure followed here (assuming use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment) comported with the standards of *Teitel Film Corp.* v. *Cusack,* 390 U. S. 139; *Freedman* v. *Maryland,* 380 U. S. 51; and *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436. Pp. 54–55.

3. It was not error to fail to require expert affirmative evidence of the films' obscenity, since the films (which were the best evidence of what they depicted) were themselves placed in evidence. P. 56.

4. States have a legitimate interest in regulating commerce in obscene material and its exhibition in places of public accommodation, including "adult" theaters. Pp. 57–69.

(a) There is a proper state concern with safeguarding against crime and the other arguably ill effects of obscenity by prohibiting the public or commercial exhibition of obscene material. Though conclusive proof is lacking, the States may reasonably determine that a nexus does or might exist between antisocial behavior and obscene material, just as States have acted on unprovable assumptions in other areas of public control. Pp. 57–63.

(b) Though States are free to adopt a laissez-faire policy toward commercialized obscenity, they are not constitutionally obliged to do so. P. 64.

(c) Exhibition of obscene material in places of public accommodation is not protected by any constitutional doctrine of privacy. A commercial theater cannot be equated with a private home; nor is there here a privacy right arising from a special relationship, such as marriage. *Stanley* v. *Georgia*, 394 U. S. 557; *Griswold* v. *Connecticut*, 381 U. S. 479, distinguished. Nor can the privacy of the home be equated with a "zone" of "privacy" that follows a consumer of obscene materials wherever he goes. *United States* v. *Orito*, *post*, p. 139; *United States* v. *12 200-ft. Reels of Film*, *post*, p. 123. Pp. 65–67.

(d) Preventing the unlimited display of obscene material is not thought control. Pp. 67–68.

(e) Not all conduct directly involving "consenting adults" only has a claim to constitutional protection. Pp. 68–69.

5. The Georgia obscenity laws involved herein should now be re-evaluated in the light of the First Amendment standards newly enunciated by the Court in *Miller* v. *California*, *ante*, p. 15. Pp. 69–70.

228 Ga. 343, 185 S. E. 2d 768, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 70. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 73.

Robert Eugene Smith argued the cause for petitioners. With him on the brief were *Mel S. Friedman* and *D. Freeman Hutton*.

Thomas E. Moran argued the cause for respondents. With him on the brief was *Joel M. Feldman*.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Petitioners are two Atlanta, Georgia, movie theaters and their owners and managers, operating in the

**Charles H. Keating, Jr., pro se, Richard M. Bertsch, James J. Clancy,* and *Albert S. Johnston III* filed a brief for Charles H. Keating, Jr., as *amicus curiae* urging affirmance.

style of "adult" theaters. On December 28, 1970, respondents, the local state district attorney and the solicitor for the local state trial court, filed civil complaints in that court alleging that petitioners were exhibiting to the public for paid admission two allegedly obscene films, contrary to Georgia Code Ann. § 26–2101.[1] The two films in question, "Magic Mirror" and "It All Comes Out in the End," depict sexual conduct char-

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[1] This is a civil proceeding. Georgia Code Ann. § 26–2101 defines a criminal offense, but the exhibition of materials found to be "obscene" as defined by that statute may be enjoined in a civil proceeding under Georgia case law. *1024 Peachtree Corp.* v. *Slaton,* 228 Ga. 102, 184 S. E. 2d 144 (1971); *Walter* v. *Slaton,* 227 Ga. 676, 182 S. E. 2d 464 (1971); *Evans Theatre Corp.* v. *Slaton,* 227 Ga. 377, 180 S. E. 2d 712 (1971). See *infra,* at 54. Georgia Code Ann. § 26–2101 reads in relevant part:

"Distributing obscene materials.

"(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do . . . .

"(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. . . .

. . . . . .

"(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both."

The constitutionality of Georgia Code Ann. § 26–2101 was upheld against First Amendment and due process challenges in *Gable* v. *Jenkins,* 309 F. Supp. 998 (ND Ga. 1969), aff'd *per curiam,* 397 U. S. 592 (1970).

acterized by the Georgia Supreme Court as "hard core pornography" leaving "little to the imagination."

Respondents' complaints, made on behalf of the State of Georgia, demanded that the two films be declared obscene and that petitioners be enjoined from exhibiting the films. The exhibition of the films was not enjoined, but a temporary injunction was granted *ex parte* by the local trial court, restraining petitioners from destroying the films or removing them from the jurisdiction. Petitioners were further ordered to have one print each of the films in court on January 13, 1971, together with the proper viewing equipment.

On January 13, 1971, 15 days after the proceedings began, the films were produced by petitioners at a jury-waived trial. Certain photographs, also produced at trial, were stipulated to portray the single entrance to both Paris Adult Theatre I and Paris Adult Theatre II as it appeared at the time of the complaints. These photographs show a conventional, inoffensive theater entrance, without any pictures, but with signs indicating that the theaters exhibit "Atlanta's Finest Mature Feature Films." On the door itself is a sign saying: "Adult Theatre—You must be 21 and able to prove it. If viewing the nude body offends you, Please Do Not Enter."

The two films were exhibited to the trial court. The only other state evidence was testimony by criminal investigators that they had paid admission to see the films and that nothing on the outside of the theater indicated the full nature of what was shown. In particular, nothing indicated that the films depicted—as they did—scenes of simulated fellatio, cunnilingus, and group sex intercourse. There was no evidence presented that minors had ever entered the theaters. Nor was there evidence presented that petitioners had a systematic policy of barring minors, apart from posting signs at the entrance. On April 12, 1971, the trial judge dismissed

respondents' complaints. He assumed "that obscenity is established," but stated:

> "It appears to the Court that the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible."

On appeal, the Georgia Supreme Court unanimously reversed. It assumed that the adult theaters in question barred minors and gave a full warning to the general public of the nature of the films shown, but held that the films were without protection under the First Amendment. Citing the opinion of this Court in *United States* v. *Reidel,* 402 U. S. 351 (1971), the Georgia court stated that "the sale and delivery of obscene material to willing adults is not protected under the first amendment." The Georgia court also held *Stanley* v. *Georgia,* 394 U. S. 557 (1969), to be inapposite since it did not deal with "the commercial distribution of pornography, but with the right of Stanley to possess, in the privacy of his home, pornographic films." 228 Ga. 343, 345, 185 S. E. 2d 768, 769 (1971). After viewing the films, the Georgia Supreme Court held that their exhibition should have been enjoined, stating:

> "The films in this case leave little to the imagination. It is plain what they purport to depict, that is, conduct of the most salacious character. We hold that these films are also hard core pornography, and the showing of such films should have been enjoined since their exhibition is not protected by the first amendment." *Id.,* at 347, 185 S. E. 2d, at 770.

I

It should be clear from the outset that we do not undertake to tell the States what they must do, but

rather to define the area in which they may chart their own course in dealing with obscene material. This Court has consistently held that obscene material is not protected by the First Amendment as a limitation on the state police power by virtue of the Fourteenth Amendment. *Miller* v. *California*, *ante*, at 23–25; *Kois* v. *Wisconsin*, 408 U. S. 229, 230 (1972); *United States* v. *Reidel*, *supra*, at 354; *Roth* v. *United States*, 354 U. S. 476, 485 (1957).

Georgia case law permits a civil injunction of the exhibition of obscene materials. See *1024 Peachtree Corp.* v. *Slaton*, 228 Ga. 102, 184 S. E. 2d 144 (1971); *Walter* v. *Slaton*, 227 Ga. 676, 182 S. E. 2d 464 (1971); *Evans Theatre Corp.* v. *Slaton*, 227 Ga. 377, 180 S. E. 2d 712 (1971). While this procedure is civil in nature, and does not directly involve the state criminal statute proscribing exhibition of obscene material,[2] the Georgia case law permitting civil injunction does adopt the definition of "obscene materials" used by the criminal statute.[3] Today, in *Miller* v. *California*, *supra*, we have

[2] See Georgia Code Ann. § 26–2101, set out *supra*, at 51 n. 1.

[3] In *Walter* v. *Slaton*, 227 Ga. 676, 182 S. E. 2d 464 (1971), the Georgia Supreme Court described the cases before it as follows: "Each case was commenced as a civil action by the District Attorney of the Superior Court of Fulton County jointly with the Solicitor of the Criminal Court of Fulton County. In each case the plaintiffs alleged that the defendants named therein were conducting a business of exhibiting motion picture films to members of the public; that they were in control and possession of the described motion picture film which they were exhibiting to the public on a fee basis; that said film 'constitutes a flagrant violation of Ga. Code § 26–2101 in that the sole and dominant theme of the motion picture film . . . considered as a whole, and applying contemporary standards, appeals to the prurient interest in sex and nudity, and that said motion picture film is utterly and absolutely without any redeeming social value whatsoever and transgresses beyond the customary limits of candor in describing and discussing sexual matters.'" *Id.*, at 676–677, 182 S. E. 2d, at 465.

sought to clarify the constitutional definition of obscene material subject to regulation by the States, and we vacate and remand this case for reconsideration in light of *Miller*.

This is not to be read as disapproval of the Georgia civil procedure employed in this case, assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment. On the contrary, such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation.[4] See *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 441–444 (1957). Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected.[5] Thus the standards of *Blount* v. *Rizzi*, 400 U. S. 410, 417 (1971); *Teitel Film Corp.* v. *Cusack*, 390 U. S. 139, 141–142 (1968); *Freedman* v. *Maryland*, 380 U. S. 51, 58–59 (1965), and *Kingsley Books, Inc.* v. *Brown, supra*, at 443–445, were met. Cf. *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 367–369 (1971) (opinion of WHITE, J.).

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[4] This procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action, prior to any exposure to criminal penalty. We are not here presented with the problem of whether a holding that materials were not obscene could be circumvented in a later proceeding by evidence of pandering. See *Memoirs* v. *Massachusetts*, 383 U. S. 413, 458 n. 3 (1966) (Harlan, J., dissenting); *Ginzburg* v. *United States*, 383 U. S. 463, 496 (1966) (Harlan, J., dissenting).

[5] At the specific request of petitioners' counsel, the copies of the films produced for the trial court were placed in the "administrative custody" of that court pending the outcome of this litigation.

Nor was it error to fail to require "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. *United States* v. *Groner,* 479 F. 2d 577, 579–586 (CA5 1973); *id.,* at 586–588 (Ainsworth, J., concurring); *id.,* at 588–589 (Clark, J., concurring); *United States* v. *Wild,* 422 F. 2d 34, 35–36 (CA2 1969), cert. denied, 402 U. S. 986 (1971); *Kahm* v. *United States,* 300 F. 2d 78, 84 (CA5), cert. denied, 369 U. S. 859 (1962); *State* v. *Amato,* 49 Wis. 2d 638, 645, 183 N. W. 2d 29, 32 (1971), cert. denied *sub nom. Amato* v. *Wisconsin,* 404 U. S. 1063 (1972). See *Smith* v. *California,* 361 U. S. 147, 172 (1959) (Harlan, J., concurring and dissenting); *United States* v. *Brown,* 328 F. Supp. 196, 199 (ED Va. 1971). The films, obviously, are the best evidence of what they represent.[6] "In the cases in which this Court has decided obscenity questions since *Roth,* it has regarded the materials as sufficient in themselves for the determination of the question." *Ginzburg* v. *United States,* 383 U. S. 463, 465 (1966).

[6] This is not a subject that lends itself to the traditional use of expert testimony. Such testimony is usually admitted for the purpose of explaining to lay jurors what they otherwise could not understand. Cf. 2 J. Wigmore, Evidence §§ 556, 559 (3d ed. 1940). No such assistance is needed by jurors in obscenity cases; indeed the "expert witness" practices employed in these cases have often made a mockery out of the otherwise sound concept of expert testimony. See *United States* v. *Groner,* 479 F. 2d 577, 585–586 (CA5 1973); *id.,* at 587–588 (Ainsworth, J., concurring). "Simply stated, hard core pornography . . . can and does speak for itself." *United States* v. *Wild,* 422 F. 2d 34, 36 (CA2 1970), cert. denied, 402 U. S. 986 (1971). We reserve judgment, however, on the extreme case, not presented here, where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest. See *Mishkin* v. *New York,* 383 U. S. 502, 508–510 (1966); *United States* v. *Klaw,* 350 F. 2d 155, 167–168 (CA2 1965).

II

We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only. This holding was properly rejected by the Georgia Supreme Court. Although we have often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles and unconsenting adults, see *Miller* v. *California, ante,* at 18–20; *Stanley* v. *Georgia,* 394 U. S., at 567; *Redrup* v. *New York,* 386 U. S. 767, 769 (1967), this Court has never declared these to be the only legitimate state interests permitting regulation of obscene material. The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions. See *United States* v. *Thirty-seven Photographs, supra,* at 376–377 (opinion of WHITE, J.); *United States* v. *Reidel,* 402 U. S., at 354–356. Cf. *United States* v. *Thirty-seven Photographs, supra,* at 378 (STEWART, J., concurring). "In an unbroken series of cases extending over a long stretch of this Court's history, it has been accepted as a postulate that 'the primary requirements of decency may be enforced against obscene publications.' [*Near* v. *Minnesota,* 283 U. S. 697, 716 (1931)]." *Kingsley Books, Inc.* v. *Brown, supra,* at 440.

In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to pass-

ersby.[7] Rights and interests "other than those of the advocates are involved." *Breard* v. *Alexandria*, 341 U. S. 622, 642 (1951). These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself. The Hill-Link Minority Report of the Commission on Obscenity and Pornography indicates that there is at least an arguable correlation between obscene material and crime.[8] Quite

[7] It is conceivable that an "adult" theater can—if it really insists—prevent the exposure of its obscene wares to juveniles. An "adult" bookstore, dealing in obscene books, magazines, and pictures, cannot realistically make this claim. The Hill-Link Minority Report of the Commission on Obscenity and Pornography emphasizes evidence (the Abelson National Survey of Youth and Adults) that, although most pornography may be bought by elders, "the heavy users and most highly exposed people to pornography are adolescent females (among women) and adolescent and young adult males (among men)." The Report of the Commission on Obscenity and Pornography 401 (1970). The legitimate interest in preventing exposure of juveniles to obscene material cannot be fully served by simply barring juveniles from the immediate physical premises of "adult" bookstores, when there is a flourishing "outside business" in these materials.

[8] The Report of the Commission on Obscenity and Pornography 390–412 (1970). For a discussion of earlier studies indicating "a division of thought [among behavioral scientists] on the correlation between obscenity and socially deleterious behavior," *Memoirs* v. *Massachusetts*, *supra*, at 451, and references to expert opinions that obscene material may induce crime and antisocial conduct, see *id.*, at 451–453 (Clark, J., dissenting). Mr. Justice Clark emphasized:

"While erotic stimulation caused by pornography may be legally insignificant in itself, there are medical experts who believe that such stimulation frequently manifests itself in criminal sexual behavior or other antisocial conduct. For example, Dr. George W. Henry of Cornell University has expressed the opinion that obscenity, with its exaggerated and morbid emphasis on sex, particularly abnormal and perverted practices, and its unrealistic pres-

apart from sex crimes, however, there remains one problem of large proportions aptly described by Professor Bickel:

> "It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life, now and in the future. A man may be entitled to read an obscene book in his room, or expose himself indecently there . . . . We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, *then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies.* Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not." 22 The Public Interest 25–26 (Winter 1971).[9] (Emphasis added.)

As Mr. Chief Justice Warren stated, there is a "right of the Nation and of the States to maintain a decent soci-

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entation of sexual behavior and attitudes, may induce antisocial conduct by the average person. A number of sociologists think that this material may have adverse effects upon individual mental health, with potentially disruptive consequences for the community.

. . . . . .

"Congress and the legislatures of every State have enacted measures to restrict the distribution of erotic and pornographic material, justifying these controls by reference to evidence that antisocial behavior may result in part from reading obscenity." *Id.*, at 452–453 (footnotes omitted).

[9] See also Berns, Pornography vs. Democracy: The Case for Censorship, in 22 The Public Interest 3 (Winter 1971); van den Haag, in Censorship: For & Against 156–157 (H. Hart ed. 1971).

ety . . . ," *Jacobellis* v. *Ohio*, 378 U. S. 184, 199 (1964) (dissenting opinion).[10] See *Memoirs* v. *Massachusetts*, 383 U. S. 413, 457 (1966) (Harlan, J., dissenting); *Beauharnais* v. *Illinois*, 343 U. S. 250, 256–257 (1952); *Kovacs* v. *Cooper*, 336 U. S. 77, 86–88 (1949).

But, it is argued, there are no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society. It is urged on behalf of the petitioners that, absent such a demonstration, any kind of state regulation is "impermissible." We reject this argument. It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution itself.[11] MR. JUSTICE BRENNAN, speaking for the Court in *Ginsberg* v. *New York*, 390 U. S. 629, 642–643 (1968), said: "We do not demand of legislatures 'scientifically certain criteria of legislation.' *Noble State Bank* v. *Haskell*, 219 U. S. 104, 110." Although there is no conclusive proof of a connection between antisocial behavior

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[10] "In this and other cases in this area of the law, which are coming to us in ever-increasing numbers, we are faced with the resolution of rights basic both to individuals and to society as a whole. Specifically, we are called upon to reconcile the right of the Nation and of the States to maintain a decent society and, on the other hand, the right of individuals to express themselves freely in accordance with the guarantees of the First and Fourteenth Amendments." *Jacobellis* v. *Ohio*, *supra*, at 199 (Warren, C. J., dissenting).

[11] Mr. Justice Holmes stated in another context, that:

"[T]he proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." *Tyson & Brother* v. *Banton*, 273 U. S. 418, 446 (1927) (dissenting opinion joined by Brandeis, J.).

and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding *Roth,* this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect *"the social interest in order and morality." Roth* v. *United States,* 354 U. S., at 485, quoting *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942) (emphasis added in *Roth*).[12]

From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. See *Ferguson* v. *Skrupa,* 372 U. S. 726, 730 (1963); *Breard* v. *Alexandria,* 341 U. S., at 632–633, 641–645; *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525, 536–537 (1949). The same is true of the federal securities and antitrust laws and a host of federal regulations. See *SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U. S. 180, 186–195 (1963); *American Power & Light Co.* v. *SEC,* 329 U. S. 90, 99–103 (1946); *North American Co.* v. *SEC,* 327 U. S. 686, 705–707 (1946), and cases cited. See also *Brooks* v. *United States,* 267 U. S. 432, 436–437 (1925), and *Hoke* v. *United States,* 227 U. S. 308, 322 (1913). On the basis of these assumptions both Congress and state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing "coupons," and "trading stamps,"

[12] *"It has been well observed that such* [lewd and obscene] *utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Roth* v. *United States,* 354 U. S. 476, 485 (1957), quoting *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942) (emphasis added in *Roth*).

commanding what they must and must not publish and announce. See *Sugar Institute, Inc.* v. *United States,* 297 U. S. 553, 597–602 (1936); *Merrick* v. *N. W. Halsey & Co.,* 242 U. S. 568, 584–589 (1917); *Caldwell* v. *Sioux Falls Stock Yards Co.,* 242 U. S. 559, 567–568 (1917); *Hall* v. *Geiger-Jones Co.,* 242 U. S. 539, 548–552 (1917); *Tanner* v. *Little,* 240 U. S. 369, 383–386 (1916); *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 363–368 (1916). Understandably those who entertain an absolutist view of the First Amendment find it uncomfortable to explain why rights of association, speech, and press should be severely restrained in the marketplace of goods and money, but not in the marketplace of pornography.

Likewise, when legislatures and administrators act to protect the physical environment from pollution and to preserve our resources of forests, streams, and parks, they must act on such imponderables as the impact of a new highway near or through an existing park or wilderness area. See *Citizens to Preserve Overton Park* v. *Volpe,* 401 U. S. 402, 417–420 (1971). Thus, § 18 (a) of the Federal-Aid Highway Act of 1968, 23 U. S. C. § 138, and the Department of Transportation Act of 1966, as amended, 82 Stat. 824, 49 U. S. C. § 1653 (f), have been described by Mr. Justice Black as "a solemn determination of the highest law-making body of this Nation that the beauty and health-giving facilities of our parks are not to be taken away for public roads without hearings, factfindings, and policy determinations under the supervision of a Cabinet officer . . . ." *Citizens to Preserve Overton Park, supra,* at 421 (separate opinion joined by BRENNAN, J.). The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.

If we accept the unprovable assumption that a complete education requires the reading of certain books, see *Board of Education* v. *Allen,* 392 U. S. 236, 245 (1968), and *Johnson* v. *New York State Education Dept.,* 449 F. 2d 871, 882–883 (CA2 1971) (dissenting opinion), vacated and remanded to consider mootness, 409 U. S. 75 (1972), *id.,* at 76–77 (MARSHALL, J., concurring), and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior? "Many of these effects may be intangible and indistinct, but they are nonetheless real." *American Power & Light Co.* v. *SEC, supra,* at 103. Mr. Justice Cardozo said that all laws in Western civilization are "guided by a robust common sense . . . ." *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 590 (1937). The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

It is argued that individual "free will" must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on

certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. We have just noted, for example, that neither the First Amendment nor "free will" precludes States from having "blue sky" laws to regulate what sellers of securities may write or publish about their wares. See *supra*, at 61–62. Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition. Nor do modern societies leave disposal of garbage and sewage up to the individual "free will," but impose regulation to protect both public health and the appearance of public places. States are told by some that they must await a "laissez-faire" market solution to the obscenity-pornography problem, paradoxically "by people who have never otherwise had a kind word to say for laissez-faire," particularly in solving urban, commercial, and environmental pollution problems. See I. Kristol, On the Democratic Idea in America 37 (1972).

The States, of course, may follow such a "laissez-faire" policy and drop all controls on commercialized obscenity, if that is what they prefer, just as they can ignore consumer protection in the marketplace, but nothing in the Constitution *compels* the States to do so with regard to matters falling within state jurisdiction. See *United States* v. *Reidel*, 402 U. S., at 357; *Memoirs* v. *Massachusetts*, 383 U. S., at 462 (WHITE, J., dissenting). "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965). See *Ferguson* v. *Skrupa*, 372 U. S., at 731; *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, 423 (1952).

It is asserted, however, that standards for evaluating state commercial regulations are inapposite in the present context, as state regulation of access by consenting adults to obscene material violates the constitutionally protected right to privacy enjoyed by petitioners' customers. Even assuming that petitioners have vicarious standing to assert potential customers' rights, it is unavailing to compare a theater open to the public for a fee, with the private home of *Stanley* v. *Georgia,* 394 U. S., at 568, and the marital bedroom of *Griswold* v. *Connecticut, supra,* at 485–486. This Court, has, on numerous occasions, refused to hold that commercial ventures such as a motion-picture house are "private" for the purpose of civil rights litigation and civil rights statutes. See *Sullivan* v. *Little Hunting Park, Inc.,* 396 U. S. 229, 236 (1969); *Daniel* v. *Paul,* 395 U. S. 298, 305–308 (1969); *Blow* v. *North Carolina,* 379 U. S. 684, 685–686 (1965); *Hamm* v. *Rock Hill,* 379 U. S. 306, 307–308 (1964); *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U. S. 241, 247, 260–261 (1964). The Civil Rights Act of 1964 specifically defines motion-picture houses and theaters as places of "public accommodation" covered by the Act as operations affecting commerce. 78 Stat. 243, 42 U. S. C. §§ 2000a (b)(3), (c).

Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937)." *Roe* v. *Wade,* 410 U. S. 113, 152 (1973). This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing. Cf. *Eisenstadt* v. *Baird,* 405 U. S. 438, 453–454 (1972); *id.,* at 460, 463–465 (WHITE, J., concurring); *Stanley* v. *Georgia, supra,* at 568; *Loving* v. *Virginia,* 388

U. S. 1, 12 (1967); *Griswold* v. *Connecticut, supra,* at 486; *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944); *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390, 399 (1923). Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.

If obscene material unprotected by the First Amendment in itself carried with it a "penumbra" of constitutionally protected privacy, this Court would not have found it necessary to decide *Stanley* on the narrow basis of the "privacy of the home," which was hardly more than a reaffirmation that "a man's home is his castle." Cf. *Stanley* v. *Georgia, supra,* at 564.[13] Moreover, we have declined to equate the privacy of the home relied on in *Stanley* with a "zone" of "privacy" that follows a distributor or a consumer of obscene materials wherever he goes. See *United States* v. *Orito, post,* at 141–143; *United States* v. *12 200-ft. Reels of Film, post,* at 126–129; *United States* v. *Thirty-seven Photographs,* 402 U. S., at 376–377 (opinion of WHITE, J.); *United States* v. *Reidel, supra,* at 355. The idea of a "privacy" right and a place of public accommodation are, in this context,

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[13] The protection afforded by *Stanley* v. *Georgia,* 394 U. S. 557 (1969), is restricted to a place, the home. In contrast, the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital, the hotel room, or as otherwise required to safeguard the right to intimacy involved. Cf. *Roe* v. *Wade,* 410 U. S. 113, 152–154 (1973); *Griswold* v. *Connecticut,* 381 U. S. 479, 485–486 (1965). Obviously, there is no necessary or legitimate expectation of privacy which would extend to marital intercourse on a street corner or a theater stage.

mutually exclusive. Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

It is also argued that the State has no legitimate interest in "control [of] the moral content of a person's thoughts," *Stanley* v. *Georgia, supra,* at 565, and we need not quarrel with this. But we reject the claim that the State of Georgia is here attempting to control the minds or thoughts of those who patronize theaters. Preventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political, or scientific value as communication, *Miller* v. *California, ante,* at 24, 34, is distinct from a control of reason and the intellect. Cf. *Kois* v. *Wisconsin,* 408 U. S. 229 (1972); *Roth* v. *United States, supra,* at 485–487; *Thornhill* v. *Alabama,* 310 U. S. 88, 101–102 (1940); Finnis, "Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity, 116 U. Pa. L. Rev. 222, 229–230, 241–243 (1967). Where communication of ideas, protected by the First Amendment, is not involved, or the particular privacy of the home protected by *Stanley,* or any of the other "areas or zones" of constitutionally protected privacy, the mere fact that, as a consequence, some human "utterances" or "thoughts" may be incidentally affected does not bar the State from acting to protect legitimate state interests. Cf. *Roth* v. *United States, supra,* at 483, 485–487; *Beauharnais* v. *Illinois,* 343 U. S., at 256–257. The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not

prohibited by the Constitution. Cf. *United States* v. *Reidel, supra,* at 359–360 (Harlan, J., concurring).

Finally, petitioners argue that conduct which directly involves "consenting adults" only has, for that sole reason, a special claim to constitutional protection. Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation,[14] is a step we are unable to take.[15] Commercial exploitation of depictions, descriptions, or exhibitions of obscene conduct on commercial premises open to the adult public falls within a State's broad power to regulate commerce and protect the public

[14] Cf. J. Mill, On Liberty 13 (1955 ed.).

[15] The state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing "bare fist" prize fights, and duels, although these crimes may only directly involve "consenting adults." Statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional provision. See *Davis* v. *Beason,* 133 U. S. 333, 344–345 (1890). Consider also the language of this Court in *McLaughlin* v. *Florida,* 379 U. S. 184, 196 (1964), as to adultery; *Southern Surety Co.* v. *Oklahoma,* 241 U. S. 582, 586 (1916), as to fornication; *Hoke* v. *United States,* 227 U. S. 308, 320–322 (1913), and *Caminetti* v. *United States,* 242 U. S. 470, 484–487, 491–492 (1917), as to "white slavery"; *Murphy* v. *California,* 225 U. S. 623, 629 (1912), as to billiard halls; and the *Lottery Case,* 188 U. S. 321, 355–356 (1903), as to gambling. See also the summary of state statutes prohibiting bearbaiting, cockfighting, and other brutalizing animal "sports," in Stevens, Fighting and Baiting, in Animals and Their Legal Rights 112–127 (Leavitt ed. 1970). As Professor Irving Kristol has observed: "Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles." On the Democratic Idea in America 33 (1972).

environment. The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' "right . . . to maintain a decent society." *Jacobellis* v. *Ohio,* 378 U. S., at 199 (dissenting opinion).

To summarize, we have today reaffirmed the basic holding of *Roth* v. *United States, supra,* that obscene material has no protection under the First Amendment. See *Miller* v. *California, supra,* and *Kaplan* v. *California, post,* p. 115. We have directed our holdings, not at thoughts or speech, but at depiction and description of specifically defined sexual conduct that States may regulate within limits designed to prevent infringement of First Amendment rights. We have also reaffirmed the holdings of *United States* v. *Reidel, supra,* and *United States* v. *Thirty-seven Photographs, supra,* that commerce in obscene material is unprotected by any constitutional doctrine of privacy. *United States* v. *Orito, post,* at 141–143; *United States* v. *12 200-ft. Reels of Film, post,* at 126–129. In this case we hold that the States have a legitimate interest in regulating commerce in obscene material and in regulating exhibition of obscene material in places of public accommodation, including so-called "adult" theaters from which minors are excluded. In light of these holdings, nothing precludes the State of Georgia from the regulation of the allegedly obscene material exhibited in Paris Adult Theatre I or II, provided that the applicable Georgia law, as written or authoritatively interpreted by the Georgia courts, meets the First Amendment standards set forth in *Miller* v. *California, ante,* at 23–25. The

judgment is vacated and the case remanded to the Georgia Supreme Court for further proceedings not inconsistent with this opinion and *Miller* v. *California, supra.* See *United States* v. *12 200-ft. Reels of Film, post,* at 130 n. 7.

Vacated and remanded.

MR. JUSTICE DOUGLAS, dissenting.

My Brother BRENNAN is to be commended for seeking a new path through the thicket which the Court entered when it undertook to sustain the constitutionality of obscenity laws and to place limits on their application. I have expressed on numerous occasions my disagreement with the basic decision that held that "obscenity" was not protected by the First Amendment. I disagreed also with the definitions that evolved. Art and literature reflect tastes; and tastes, like musical appreciation, are hardly reducible to precise definitions. That is one reason I have always felt that "obscenity" was not an exception to the First Amendment. For matters of taste, like matters of belief, turn on the idiosyncrasies of individuals. They are too personal to define and too emotional and vague to apply, as witness the prison term for Ralph Ginzburg, *Ginzburg* v. *United States,* 383 U. S. 463, not for what he printed but for the sexy manner in which he advertised his creations.

The other reason I could not bring myself to conclude that "obscenity" was not covered by the First Amendment was that prior to the adoption of our Constitution and Bill of Rights the Colonies had no law excluding "obscenity" from the regime of freedom of expression and press that then existed. I could find no such laws; and more important, our leading colonial expert, Julius Goebel, could find none, J. Goebel, Development of Legal Institutions (1946); J. Goebel, Felony and Misdemeanor (1937). So I became convinced that the

creation of the "obscenity" exception to the First Amendment was a legislative and judicial *tour de force;* that if we were to have such a regime of censorship and punishment, it should be done by constitutional amendment.

People are, of course, offended by many offerings made by merchants in this area. They are also offended by political pronouncements, sociological themes, and by stories of official misconduct. The list of activities and publications and pronouncements that offend someone is endless. Some of it goes on in private; some of it is inescapably public, as when a government official generates crime, becomes a blatant offender of the moral sensibilities of the people, engages in burglary, or breaches the privacy of the telephone, the conference room, or the home. Life in this crowded modern technological world creates many offensive statements and many offensive deeds. There is no protection against offensive ideas, only against offensive conduct.

"Obscenity" at most is the expression of offensive ideas. There are regimes in the world where ideas "offensive" to the majority (or at least to those who control the majority) are suppressed. There life proceeds at a monotonous pace. Most of us would find that world offensive. One of the most offensive experiences in my life was a visit to a nation where bookstalls were filled only with books on mathematics and books on religion.

I am sure I would find offensive most of the books and movies charged with being obscene. But in a life that has not been short, I have yet to be trapped into seeing or reading something that would offend me. I never read or see the materials coming to the Court under charges of "obscenity," because I have thought the First Amendment made it unconstitutional for me to act as a censor. I see ads in bookstores and neon lights over theaters that resemble bait for those who

seek vicarious exhilaration. As a parent or a priest or as a teacher I would have no compunction in edging my children or wards away from the books and movies that did no more than excite man's base instincts. But I never supposed that government was permitted to sit in judgment on one's tastes or beliefs—save as they involved action within the reach of the police power of government.

I applaud the effort of my Brother BRENNAN to forsake the low road which the Court has followed in this field. The new regime he would inaugurate is much closer than the old to the policy of abstention which the First Amendment proclaims. But since we do not have here the unique series of problems raised by government-imposed or government-approved captive audiences, cf. *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451, I see no constitutional basis for fashioning a rule that makes a publisher, producer, bookseller, librarian, or movie house operator criminally responsible, when he fails to take affirmative steps to protect the consumer against literature, books, or movies offensive* to those who temporarily occupy the seats of the mighty.

*What we do today is rather ominous as respects librarians. The net now designed by the Court is so finely meshed that, taken literally, it could result in raids on libraries. Libraries, I had always assumed, were sacrosanct, representing every part of the spectrum. If what is offensive to the most influential person or group in a community can be purged from a library, the library system would be destroyed.

A few States exempt librarians from laws curbing distribution of "obscene" literature. California's law, however, provides: "Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly distributes to or sends or causes to be sent to, or exhibits to, or offers to distribute or exhibit any harmful matter to a minor, is guilty of a misdemeanor." Calif. Penal Code § 313.1.

A "minor" is one under 18 years of age; the word "distribute" means "to transfer possession"; "matter" includes "any book, maga-

When man was first in the jungle he took care of himself. When he entered a societal group, controls were necessarily imposed. But our society—unlike most in the world—presupposes that freedom and liberty are in a frame of reference that makes the individual, not government, the keeper of his tastes, beliefs, and ideas. That is the philosophy of the First Amendment; and it is the article of faith that sets us apart from most nations in the world.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

This case requires the Court to confront once again the vexing problem of reconciling state efforts to suppress sexually oriented expression with the protections of the First Amendment, as applied to the States through the Fourteenth Amendment. No other aspect of the First Amendment has, in recent years, demanded so substantial a commitment of our time, generated such disharmony of views, and remained so resistant to the formulation of stable and manageable standards. I am convinced that the approach initiated 16 years ago in *Roth* v. *United States*, 354 U. S. 476 (1957), and culminating in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the

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zine, newspaper, or other printed or written material." *Id.*, §§ 313 (b), (d), (g).

"Harmful matter" is defined in § 313 (a) to mean "matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, *i. e.*, a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance for minors."

time has come to make a significant departure from that approach.

In this civil action in the Superior Court of Fulton County, the State of Georgia sought to enjoin the showing of two motion pictures, It All Comes Out In The End, and Magic Mirror, at the Paris Adult Theatres (I and II) in Atlanta, Georgia. The State alleged that the films were obscene under the standards set forth in Georgia Code Ann. § 26–2101.[1] The trial court denied injunctive relief, holding that even though the films could be considered obscene, their commercial presentation could not constitutionally be barred in the absence of proof that they were shown to minors or unconsenting adults. Reversing, the Supreme Court of Georgia found the films obscene, and held that the care taken to avoid exposure to minors and unconsenting adults was without constitutional significance.

I

The Paris Adult Theatres are two commercial cinemas, linked by a common box office and lobby, on Peachtree Street in Atlanta, Georgia. On December 28, 1970, investigators employed by the Criminal Court of Fulton County entered the theaters as paying customers and viewed each of the films which are the subject of this action. Thereafter, two separate complaints, one for

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[1] Ga. Code Ann. § 26–2101 provides in pertinent part that

"(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it."

each of the two films, were filed in the Superior Court seeking a declaration that the films were obscene and an injunction against their continued presentation to the public. The complaints alleged that the films were "a flagrant violation of Georgia Code Section 26–2101 in that the sole and dominant theme[s] of the said motion picture film[s] considered as a whole and applying contemporary community standards [appeal] to the prurient interest in sex, nudity and excretion, and that the said motion picture film[s are] utterly and absolutely without any redeeming social value whatsoever, and [transgress] beyond the customary limits of candor in describing and discussing sexual matters." App. 20, 39.

Although the language of the complaints roughly tracked the language of § 26–2101, which imposes criminal penalties on persons who knowingly distribute obscene materials,[2] this proceeding was not brought pursuant to that statute. Instead, the State initiated a nonstatutory civil proceeding to determine the obscenity of the films and to enjoin their exhibition. While the parties waived jury trial and stipulated that the decision of the trial court would be final on the issue of obscenity, the State has not indicated whether it intends to bring a criminal action under the statute in the event that it succeeds in proving the films obscene.

Upon the filing of the complaints, the trial court scheduled a hearing for January 13, 1971, and entered an order temporarily restraining the defendants from concealing, destroying, altering, or removing the films

[2] Ga. Code § 26–2101 (a):

"A person commits the offense of distributing obscene materials [as described in subsection (b), n. 1, *supra*] when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do . . . ."

from the jurisdiction, but not from exhibiting the films to the public *pendente lite*. In addition to viewing the films at the hearing, the trial court heard the testimony of witnesses and admitted into evidence photographs that were stipulated to depict accurately the facade of the theater. The witnesses testified that the exterior of the theater was adorned with prominent signs reading "Adults Only," "You Must Be 21 and Able to Prove It," and "If the Nude Body Offends You, Do Not Enter." Nothing on the outside of the theater described the films with specificity. Nor were pictures displayed on the outside of the theater to draw the attention of passersby to the contents of the films. The admission charge to the theaters was $3. The trial court heard no evidence that minors had ever entered the theater, but also heard no evidence that petitioners had enforced a systematic policy of screening out minors (apart from the posting of the notices referred to above).

On the basis of the evidence submitted, the trial court concluded that the films could fairly be considered obscene, "[a]ssuming that obscenity is established by a finding that the actors cavorted about in the nude indiscriminately," but held, nonetheless, that "the display of these films in a commercial theatre, when surrounded by requisite notice to the public of their nature and by reasonable protection against the exposure of these films to minors, is constitutionally permissible." [3]

[3] The precise holding of the trial court is not free from ambiguity. After pointing out that the films could be considered obscene, and that they still could not be suppressed in the absence of exposure to juveniles or unconsenting adults, the trial court concluded that "[i]t is the judgment of this court that the films, even though they display the human body and the human personality in a most degrading fashion, are not obscene." It is not clear whether the trial court found that the films were not obscene in the sense that they were protected expression under the standards of *Roth* v. *United States*, 354 U. S. 476 (1957), and *Redrup* v. *New York*, 386 U. S.

Since the issue did not arise in a statutory proceeding, the trial court was not required to pass upon the constitutionality of any state statute, on its face or as applied, in denying the injunction sought by the State.

The Supreme Court of Georgia unanimously reversed, reasoning that the lower court's reliance on *Stanley* v. *Georgia,* 394 U. S. 557 (1969), was misplaced in view of our subsequent decision in *United States* v. *Reidel,* 402 U. S. 351 (1971):

> "In [*Reidel*] the Supreme Court expressly held that the government could constitutionally prohibit the distribution of obscene materials through the mails, even though the distribution be limited to willing recipients who state that they are adults, and, further, that the constitutional right of a person to possess obscene material in the privacy of his own home, as expressed in the *Stanley* case, does not carry with it the right to sell and deliver such material. . . . Those who choose to pass through the front door of the defendant's theater and purchase a ticket to view the films and who certify thereby that they are more than 21 years of age are willing recipients of the material in the same legal sense as were those in the *Reidel* case, who, after reading the newspaper advertisements of the material, mailed an order to the defendant accepting his solicitation to sell them the obscene booklet there. That case clearly establishes once and for all that the sale and delivery of obscene material to willing adults is not

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767 (1967), or whether it used the expression "not obscene" as a term of art to indicate that the films could not be suppressed even though they were not protected under the *Roth-Redrup* standards. In any case, the Georgia Supreme Court viewed the trial court's opinion as holding that the films could not be suppressed, even if they were unprotected expression, provided that they were not exhibited to juveniles or unconsenting adults.

protected under the first amendment." 228 Ga. 343, 346, 185 S. E. 2d 768, 769–770 (1971).

The decision of the Georgia Supreme Court rested squarely on its conclusion that the State could constitutionally suppress these films even if they were displayed only to persons over the age of 21 who were aware of the nature of their contents and who had consented to viewing them. For the reasons set forth in this opinion, I am convinced of the invalidity of that conclusion of law, and I would therefore vacate the judgment of the Georgia Supreme Court. I have no occasion to consider the extent of state power to regulate the distribution of sexually oriented materials to juveniles or to unconsenting adults. Nor am I required, for the purposes of this review, to consider whether or not these petitioners had, in fact, taken precautions to avoid exposure of films to minors or unconsenting adults.

II

In *Roth* v. *United States,* 354 U. S. 476 (1957), the Court held that obscenity, although expression, falls outside the area of speech or press constitutionally protected under the First and Fourteenth Amendments against state or federal infringement. But at the same time we emphasized in *Roth* that "sex and obscenity are not synonymous," *id.,* at 487, and that matter which is sexually oriented but not obscene is fully protected by the Constitution. For we recognized that "[s]ex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." *Ibid.*[4] *Roth* rested, in

[4] "As to all such problems, this Court said in *Thornhill* v. *Alabama,* 310 U. S. 88, 101–102 (1940):

" 'The freedom of speech and of the press guaranteed by the

other words, on what has been termed a two-level approach to the question of obscenity.[5] While much criticized,[6] that approach has been endorsed by all but two members of this Court who have addressed the question since *Roth*. Yet our efforts to implement that approach demonstrate that agreement on the existence of something called "obscenity" is still a long and painful step from agreement on a workable definition of the term.

Recognizing that "the freedoms of expression . . . are vulnerable to gravely damaging yet barely visible encroachments," *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66 (1963), we have demanded that "sensitive tools" be used to carry out the "separation of legitimate from illegitimate speech." *Speiser* v. *Randall*, 357 U. S. 513, 525 (1958). The essence of our problem in the obscenity area is that we have been unable to provide "sensitive tools" to separate obscenity from other sexually oriented but constitutionally protected speech,

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Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times*. . . . Freedom of discussion, if it would fulfill its historic function in this nation, must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.*' (Emphasis added.)" *Roth*, 354 U. S., at 487–488.

See also, *e. g.*, *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945) ("the rights of free speech and a free press are not confined to any field of human interest").

[5] See, *e. g.*, Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 10–11; cf. *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952).

[6] See, *e. g.*, T. Emerson, The System of Freedom of Expression 487 (1970); Kalven, *supra*, n. 5; Comment, More Ado About Dirty Books, 75 Yale L. J. 1364 (1966).

so that efforts to suppress the former do not spill over into the suppression of the latter. The attempt, as the late Mr. Justice Harlan observed, has only "produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication." *Interstate Circuit, Inc.* v. *Dallas,* 390 U. S. 676, 704–705 (1968) (separate opinion).

To be sure, five members of the Court did agree in *Roth* that obscenity could be determined by asking "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S., at 489. But agreement on that test—achieved in the abstract and without reference to the particular material before the Court, see *id.*, at 481 n. 8—was, to say the least, short lived. By 1967 the following views had emerged: Mr. Justice Black and MR. JUSTICE DOUGLAS consistently maintained that government is wholly powerless to regulate any sexually oriented matter on the ground of its obscenity. See, *e. g., Ginzburg* v. *United States,* 383 U. S. 463, 476, 482 (1966) (dissenting opinions); *Jacobellis* v. *Ohio,* 378 U. S. 184, 196 (1964) (concurring opinion); *Roth* v. *United States, supra,* at 508 (dissenting opinion). Mr. Justice Harlan, on the other hand, believed that the Federal Government in the exercise of its enumerated powers could control the distribution of "hard core" pornography, while the States were afforded more latitude to "[ban] any material which, taken as a whole, has been reasonably found in state judicial proceedings to treat with sex in a fundamentally offensive manner, under rationally established criteria for judging such material." *Jacobellis* v. *Ohio, supra,* at 204 (dissenting opinion). See also, *e. g., Ginzburg* v. *United States, supra,* at 493 (dissenting opinion); *A Quantity of Books* v. *Kansas,* 378 U. S. 205, 215 (1964) (dissenting opinion joined by Clark, J.); *Roth, supra,* at 496

(separate opinion). MR. JUSTICE STEWART regarded "hard core" pornography as the limit of both federal and state power. See, *e. g.*, *Ginzburg* v. *United States*, *supra*, at 497 (dissenting opinion); *Jacobellis* v. *Ohio*, *supra*, at 197 (concurring opinion).

The view that, until today, enjoyed the most, but not majority, support was an interpretation of *Roth* (and not, as the Court suggests, a veering "sharply away from the *Roth* concept" and the articulation of "a new test of obscenity," *Miller* v. *California*, *ante*, at 21) adopted by Mr. Chief Justice Warren, Mr. Justice Fortas, and the author of this opinion in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966). We expressed the view that Federal or State Governments could control the distribution of material where "three elements . . . coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Id.*, at 418. Even this formulation, however, concealed differences of opinion. Compare *Jacobellis* v. *Ohio*, *supra*, at 192–195 (BRENNAN, J., joined by Goldberg, J.) (community standards national), with *id.*, at 200–201 (Warren, C. J., joined by Clark, J., dissenting) (community standards local).[7] Moreover, it did not provide a definition covering all situations. See *Mishkin* v. *New York*, 383 U. S. 502 (1966)

[7] On the question of community standards see also *Hoyt* v. *Minnesota*, 399 U. S. 524 (1970) (BLACKMUN, J., joined by BURGER, C. J., and Harlan, J., dissenting) (flexibility for state standards); *Cain* v. *Kentucky*, 397 U. S. 319 (1970) (BURGER, C. J., dissenting) (same); *Manual Enterprises* v. *Day*, 370 U. S. 478, 488 (1962) (Harlan, J., joined by STEWART, J.) (national standards in context of federal prosecution).

(prurient appeal defined in terms of a deviant sexual group); *Ginzburg* v. *United States, supra* ("pandering" probative evidence of obscenity in close cases). See also *Ginsberg* v. *New York*, 390 U. S. 629 (1968) (obscenity for juveniles). Nor, finally, did it ever command a majority of the Court. Aside from the other views described above, Mr. Justice Clark believed that "social importance" could only "be considered together with evidence that the material in question appeals to prurient interest and is patently offensive." *Memoirs* v. *Massachusetts, supra*, at 445 (dissenting opinion). Similarly, MR. JUSTICE WHITE regarded "a publication to be obscene if its predominant theme appeals to the prurient interest in a manner exceeding customary limits of candor," *id.*, at 460–461 (dissenting opinion), and regarded " 'social importance' . . . not [as] an independent test of obscenity but [as] relevant only to determining the predominant prurient interest of the material . . . ." *Id.*, at 462.

In the face of this divergence of opinion the Court began the practice in *Redrup* v. *New York*, 386 U. S. 767 (1967), of *per curiam* reversals of convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, deemed not to be obscene.[8] This approach capped the attempt in

[8] No fewer than 31 cases have been disposed of in this fashion. Aside from the three cases reversed in *Redrup*, they are: *Keney* v. *New York*, 388 U. S. 440 (1967); *Friedman* v. *New York*, 388 U. S. 441 (1967); *Ratner* v. *California*, 388 U. S. 442 (1967); *Cobert* v. *New York*, 388 U. S. 443 (1967); *Sheperd* v. *New York*, 388 U. S. 444 (1967); *Avansino* v. *New York*, 388 U. S. 446 (1967); *Aday* v. *New York*, 388 U. S. 447 (1967); *Books, Inc.* v. *United States*, 388 U. S. 449 (1967); *A Quantity of Books* v. *Kansas*, 388 U. S. 452 (1967); *Mazes* v. *Ohio*, 388 U. S. 453 (1967); *Schackman* v. *California*, 388 U. S. 454 (1967); *Potomac News Co.* v. *United States*, 389 U. S. 47 (1967); *Conner* v. *City of Hammond*, 389 U. S. 48 (1967); *Central Magazine Sales, Ltd.* v. *United States*,

Roth to separate all forms of sexually oriented expression into two categories—the one subject to full governmental suppression and the other beyond the reach of governmental regulation to the same extent as any other protected form of speech or press. Today a majority of the Court offers a slightly altered formulation of the basic *Roth* test, while leaving entirely unchanged the underlying approach.

III

Our experience with the *Roth* approach has certainly taught us that the outright suppression of obscenity cannot be reconciled with the fundamental principles of the First and Fourteenth Amendments. For we have failed to formulate a standard that sharply distinguishes protected from unprotected speech, and out of necessity, we have resorted to the *Redrup* approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decisions. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion.

Of course, the vagueness problem would be largely of our own creation if it stemmed primarily from our

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389 U. S. 50 (1967); *Chance* v. *California,* 389 U. S. 89 (1967); *I. M. Amusement Corp.* v. *Ohio,* 389 U. S. 573 (1968); *Robert-Arthur Management Corp.* v. *Tennessee,* 389 U. S. 578 (1968); *Felton* v. *City of Pensacola,* 390 U. S. 340 (1968); *Henry* v. *Louisiana,* 392 U. S. 655 (1968); *Cain* v. *Kentucky, supra; Bloss* v. *Dykema,* 398 U. S. 278 (1970); *Walker* v. *Ohio,* 398 U. S. 434 (1970); *Hoyt* v. *Minnesota, supra; Childs* v. *Oregon,* 401 U. S. 1006 (1971); *Bloss* v. *Michigan,* 402 U. S. 938 (1971); *Burgin* v. *South Carolina,* 404 U. S. 809 (1971); *Hartstein* v. *Missouri,* 404 U. S. 988 (1971); *Wiener* v. *California,* 404 U. S. 988 (1971).

failure to reach a consensus on any one standard. But after 16 years of experimentation and debate I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials. Any effort to draw a constitutionally acceptable boundary on state power must resort to such indefinite concepts as "prurient interest," "patent offensiveness," "serious literary value," and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. Although we have assumed that obscenity does exist and that we "know it when [we] see it," *Jacobellis* v. *Ohio, supra,* at 197 (STEWART, J., concurring), we are manifestly unable to describe it in advance except by reference to concepts so elusive that they fail to distinguish clearly between protected and unprotected speech.

We have more than once previously acknowledged that "constitutionally protected expression . . . is often separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc.* v. *Sullivan,* 372 U. S., at 66. See also, *e. g., Mishkin* v. *New York, supra,* at 511. Added to the "perhaps inherent residual vagueness" of each of the current multitude of standards, *Ginzburg* v. *United States, supra,* at 475 n. 19, is the further complication that the obscenity of any particular item may depend upon nuances of presentation and the context of its dissemination. See *ibid. Redrup* itself suggested that obtrusive exposure to unwilling individuals, distribution to juveniles, and "pandering" may also bear upon the determination of

obscenity. See *Redrup* v. *New York, supra, at* 769. As Mr. Chief Justice Warren stated in a related vein, obscenity is a function of the circumstances of its dissemination:

> "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character." *Roth,* 354 U. S., at 495 (concurring opinion).

See also, *e. g., Jacobellis* v. *Ohio, supra,* at 201 (dissenting opinion); *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436, 445–446 (1957) (dissenting opinion). I need hardly point out that the factors which must be taken into account are judgmental and can only be applied on "a case-by-case, sight-by-sight" basis. *Mishkin* v. *New York, supra,* at 516 (Black, J., dissenting). These considerations suggest that no one definition, no matter how precisely or narrowly drawn, can possibly suffice for all situations, or carve out fully suppressible expression from all media without also creating a substantial risk of encroachment upon the guarantees of the Due Process Clause and the First Amendment.[9]

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[9] Although I did not join the opinion of the Court in *Stanley* v. *Georgia,* 394 U. S. 557 (1969), I am now inclined to agree that "the Constitution protects the right to receive information and ideas," and that "[t]his right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society." *Id.,* at 564. See *Martin* v. *City of Struthers,* 319 U. S. 141, 143 (1943); *Winters* v. *New York,* 333 U. S. 507, 510 (1948); *Lamont* v. *Postmaster General,* 381 U. S. 301, 307–308 (1965) (concurring opinion). This right is closely tied, as *Stanley* recognized, to "the right to be free, except in very limited circumstances, from unwarranted governmental intrusions into one's privacy." 394 U. S., at 564. See *Griswold* v.

The vagueness of the standards in the obscenity area produces a number of separate problems, and any improvement must rest on an understanding that the problems are to some extent distinct. First, a vague statute fails to provide adequate notice to persons who are engaged in the type of conduct that the statute could be thought to proscribe. The Due Process Clause of the Fourteenth Amendment requires that all criminal laws provide fair notice of "what the State commands or forbids." *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1939); *Connally* v. *General Construction Co.*, 269 U. S. 385 (1926). In the service of this general principle we have repeatedly held that the definition of obscenity must provide adequate notice of exactly what

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Connecticut, 381 U. S. 479 (1965); *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting). It is similarly related to "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child" (italics omitted), *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972), and the right to exercise "autonomous control over the development and expression of one's intellect, interests, tastes, and personality." (Italics omitted.) *Doe* v. *Bolton*, 410 U. S. 179, 211 (1973) (DOUGLAS, J., concurring). It seems to me that the recognition of these intertwining rights calls in question the validity of the two-level approach recognized in *Roth*. After all, if a person has the right to receive information without regard to its social worth—that is, without regard to its obscenity—then it would seem to follow that a State could not constitutionally punish one who undertakes to provide this information to a *willing, adult recipient*. See *Eisenstadt* v. *Baird*, *supra*, at 443–446. In any event, I need not rely on this line of analysis or explore all of its possible ramifications, for there is available a narrower basis on which to rest this decision. Whether or not a class of "obscene" and thus entirely unprotected speech does exist, I am forced to conclude that the class is incapable of definition with sufficient clarity to withstand attack on vagueness grounds. Accordingly, it is on principles of the void-for-vagueness doctrine that this opinion exclusively relies.

is prohibited from dissemination. See, *e. g.*, *Rabe* v. *Washington*, 405 U. S. 313 (1972); *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676 (1968); *Winters* v. *New York*, 333 U. S. 507 (1948). While various tests have been upheld under the Due Process Clause, see *Ginsberg* v. *New York*, 390 U. S., at 643; *Mishkin* v. *New York*, 383 U. S., at 506–507; *Roth* v. *United States*, 354 U. S., at 491–492, I have grave doubts that any of those tests could be sustained today. For I know of no satisfactory answer to the assertion by Mr. Justice Black, "after the fourteen separate opinions handed down" in the trilogy of cases decided in 1966, that "no person, not even the most learned judge much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' . . . ." *Ginzburg* v. *United States*, 383 U. S., at 480–481 (dissenting opinion). See also the statement of Mr. Justice Harlan in *Interstate Circuit, Inc.* v. *Dallas, supra*, at 707 (separate opinion). As Mr. Chief Justice Warren pointed out, "[t]he constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States* v. *Harriss*, 347 U. S. 612, 617 (1954). In this context, even the most painstaking efforts to determine in advance whether certain sexually oriented expression is obscene must inevitably prove unavailing. For the insufficiency of the notice compels persons to guess not only whether their conduct is covered by a criminal statute, but also whether their conduct falls within the constitutionally permissible reach of the statute. The resulting level of uncertainty is utterly intolerable, not alone because it makes

"[b]ookselling . . . a hazardous profession," *Ginsberg* v. *New York, supra,* at 674 (Fortas, J., dissenting), but as well because it invites arbitrary and erratic enforcement of the law. See, *e. g., Papachristou* v. *City of Jacksonville,* 405 U. S. 156 (1972); *Gregory* v. *City of Chicago,* 394 U. S. 111, 120 (1969) (Black, J., concurring); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Cantwell* v. *Connecticut,* 310 U. S. 296, 308 (1940); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940).

In addition to problems that arise when any criminal statute fails to afford fair notice of what it forbids, a vague statute in the areas of speech and press creates a second level of difficulty. We have indicated that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser." [10] *Smith* v. *California,* 361 U. S. 147, 151 (1959). That proposition draws its strength from our recognition that

> "[t]he fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar . . . ." *Roth, supra,* at 488.[11]

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[10] In this regard, the problems of vagueness and overbreadth are, plainly, closely intertwined. See *NAACP* v. *Button,* 371 U. S. 415, 432–433 (1963); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 845 (1970). Cf. *infra,* at 93–94.

[11] See also *Speiser* v. *Randall,* 357 U. S. 513 (1958); cf. *Barenblatt* v. *United States,* 360 U. S. 109, 137–138 (1959) (Black, J., dissenting):

"This Court . . . has emphasized that the 'vice of vagueness' is

To implement this general principle, and recognizing the inherent vagueness of any definition of obscenity, we have held that the definition of obscenity must be drawn as narrowly as possible so as to minimize the interference with protected expression. Thus, in *Roth* we rejected the test of *Regina* v. *Hicklin,* [1868] L. R. 3 Q. B. 360, that "[judged] obscenity by the effect of isolated passages upon the most susceptible persons." 354 U. S., at 489. That test, we held in *Roth,* "might well encompass material legitimately treating with sex . . . ." *Ibid.* Cf. *Mishkin* v. *New York, supra,* at 509. And we have supplemented the *Roth* standard with additional tests in an effort to hold in check the corrosive effect of vagueness on the guarantees of the First Amendment.[12] We have held, for example, that "a State is not free to adopt whatever procedures it pleases

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especially pernicious where legislative power over an area involving speech, press, petition and assembly is involved. . . . For a statute broad enough to support infringement of speech, writings, thoughts and public assemblies, against the unequivocal command of the First Amendment necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others. Vagueness becomes even more intolerable in this area if one accepts, as the Court today does, a balancing test to decide if First Amendment rights shall be protected. It is difficult at best to make a man guess—at the penalty of imprisonment—whether a court will consider the State's need for certain information superior to society's interest in unfettered freedom. It is unconscionable to make him choose between the right to keep silent and the need to speak when the statute supposedly establishing the 'state's interest' is too vague to give him guidance." (Citations omitted.)

[12] Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 885–886 and n. 158 (1970) ("Thus in the area of obscenity the overbreadth doctrine operates interstitially, when no line of privilege is apposite or yet to be found, to control the impact of schemes designed to curb distribution of unprotected material").

for dealing with obscenity . . . ." *Marcus* v. *Search Warrant,* 367 U. S. 717, 731 (1961). "Rather, the First Amendment requires that procedures be incorporated that 'ensure against the curtailment of constitutionally protected expression . . . .'" *Blount* v. *Rizzi,* 400 U. S. 410, 416 (1971), quoting from *Bantam Books, Inc.,* v. *Sullivan,* 372 U. S., at 66. See generally *Rizzi, supra,* at 417; *United States* v. *Thirty-seven Photographs,* 402 U. S. 363, 367–375 (1971); *Lee Art Theatre, Inc.* v. *Virginia,* 392 U. S. 636 (1968); *Freedman* v. *Maryland,* 380 U. S. 51, 58–60 (1965); *A Quantity of Books* v. *Kansas,* 378 U. S. 205 (1964) (plurality opinion).

Similarly, we have held that a State cannot impose criminal sanctions for the possession of obscene material absent proof that the possessor had knowledge of the contents of the material. *Smith* v. *California, supra.* "Proof of scienter" is necessary "to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." *Mishkin* v. *New York, supra,* at 511; *Ginsberg* v. *New York, supra,* at 644–645. In short,

> "[t]he objectionable quality of vagueness and overbreadth . . . [is] the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. *Marcus* v. *Search Warrant,* 367 U. S. 717, 733. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. *Smith* v. *California,* [361 U. S.], at 151–154; *Speiser* v. *Randall,* 357 U. S. 513, 526. Because First Amendment freedoms need breathing space to survive, government

> may regulate in the area only with narrow specificity. *Cantwell* v. *Connecticut,* 310 U. S. 296, 311." *NAACP* v. *Button,* 371 U. S. 415, 432–433 (1963).

The problems of fair notice and chilling protected speech are very grave standing alone. But it does not detract from their importance to recognize that a vague statute in this area creates a third, although admittedly more subtle, set of problems. These problems concern the institutional stress that inevitably results where the line separating protected from unprotected speech is excessively vague. In *Roth* we conceded that "there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls . . . ." 354 U. S., at 491–492. Our subsequent experience demonstrates that almost every case is "marginal." And since the "margin" marks the point of separation between protected and unprotected speech, we are left with a system in which almost every obscenity case presents a constitutional question of exceptional difficulty. "The suppression of a particular writing or other tangible form of expression is . . . an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards." *Roth, supra,* at 497 (separate opinion of Harlan, J.).

Examining the rationale, both explicit and implicit, of our vagueness decisions, one commentator has viewed these decisions as an attempt by the Court to establish an "insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms." Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 75 (1960). The buffer zone enables the Court to fend off legislative attempts

"to pass to the courts—and ultimately to the Supreme Court—the awesome task of making case by case at once the criminal and the constitutional law." *Id.*, at 81. Thus,

> "[b]ecause of the Court's limited power to re-examine fact on a cold record, what appears to be going on in the administration of the law must be forced, by restrictive procedures, to reflect what is really going on; and because of the impossibility, through sheer volume of cases, of the Court's effectively policing law administration case by case, those procedures must be framed to assure, as well as procedures can assure, a certain overall *probability* of regularity. *Id.*, at 89 (emphasis in original).

As a result of our failure to define standards with predictable application to any given piece of material, there is no probability of regularity in obscenity decisions by state and lower federal courts. That is not to say that these courts have performed badly in this area or paid insufficient attention to the principles we have established. The problem is, rather, that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so. The number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court.

But the sheer number of the cases does not define the full extent of the institutional problem. For, quite apart from the number of cases involved and the need to make a fresh constitutional determination in each case, we are tied to the "absurd business of perusing and viewing the miserable stuff that pours into the Court . . . ." *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S., at 707 (separate opinion of Harlan, J.). While the material may have varying degrees of social importance,

it is hardly a source of edification to the members of this Court who are compelled to view it before passing on its obscenity. Cf. *Mishkin* v. *New York,* 383 U. S., at 516–517 (Black, J., dissenting).

Moreover, we have managed the burden of deciding scores of obscenity cases by relying on *per curiam* reversals or denials of certiorari—a practice which conceals the rationale of decision and gives at least the appearance of arbitrary action by this Court. See *Bloss* v. *Dykema,* 398 U. S. 278 (1970) (Harlan, J., dissenting). More important, no less than the procedural schemes struck down in such cases as *Blount* v. *Rizzi, supra,* and *Freedman* v. *Maryland, supra,* the practice effectively censors protected expression by leaving lower court determinations of obscenity intact even though the status of the allegedly obscene material is entirely unsettled until final review here. In addition, the uncertainty of the standards creates a continuing source of tension between state and federal courts, since the need for an independent determination by this Court seems to render superfluous even the most conscientious analysis by state tribunals. And our inability to justify our decisions with a persuasive rationale—or indeed, any rationale at all—necessarily creates the impression that we are merely second-guessing state court judges.

The severe problems arising from the lack of fair notice, from the chill on protected expression, and from the stress imposed on the state and federal judicial machinery persuade me that a significant change in direction is urgently required. I turn, therefore, to the alternatives that are now open.

IV

1. The approach requiring the smallest deviation from our present course would be to draw a new line between protected and unprotected speech, still permit-

ting the States to suppress all material on the unprotected side of the line. In my view, clarity cannot be obtained pursuant to this approach except by drawing a line that resolves all doubt in favor of state power and against the guarantees of the First Amendment. We could hold, for example, that any depiction or description of human sexual organs, irrespective of the manner or purpose of the portrayal, is outside the protection of the First Amendment and therefore open to suppression by the States. That formula would, no doubt, offer much fairer notice of the reach of any state statute drawn at the boundary of the State's constitutional power. And it would also, in all likelihood, give rise to a substantial probability of regularity in most judicial determinations under the standard. But such a standard would be appallingly overbroad, permitting the suppression of a vast range of literary, scientific, and artistic masterpieces. Neither the First Amendment nor any free community could possibly tolerate such a standard. Yet short of that extreme it is hard to see how any choice of words could reduce the vagueness problem to tolerable proportions, so long as we remain committed to the view that some class of materials is subject to outright suppression by the State.

2. The alternative adopted by the Court today recognizes that a prohibition against any depiction or description of human sexual organs could not be reconciled with the guarantees of the First Amendment. But the Court does retain the view that certain sexually oriented material can be considered obscene and therefore unprotected by the First and Fourteenth Amendments. To describe that unprotected class of expression, the Court adopts a restatement of the *Roth-Memoirs* definition of obscenity: "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the

work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* v. *California, ante,* at 24. In apparent illustration of "sexual conduct," as that term is used in the test's second element, the Court identifies "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated," and "(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.,* at 25.

The differences between this formulation and the three-pronged *Memoirs* test are, for the most part, academic.[13] The first element of the Court's test is virtually identical to the *Memoirs* requirement that "the dominant theme of the material taken as a whole [must appeal] to a prurient interest in sex." 383 U. S., at 418. Whereas the second prong of the *Memoirs* test demanded that the material be

[13] While the Court's modification of the *Memoirs* test is small, it should still prove sufficient to invalidate virtually every state law relating to the suppression of obscenity. For, under the Court's restatement, a statute must specifically enumerate certain forms of sexual conduct, the depiction of which is to be prohibited. It seems highly doubtful to me that state courts will be able to construe state statutes so as to incorporate a carefully itemized list of various forms of sexual conduct, and thus to bring them into conformity with the Court's requirements. Cf. *Blount* v. *Rizzi,* 400 U. S. 410, 419 (1971). The statutes of at least one State should, however, escape the wholesale invalidation. Oregon has recently revised its statute to prohibit only the distribution of obscene materials to juveniles or unconsenting adults. The enactment of this principle is, of course, a choice constitutionally open to every State, even under the Court's decision. See Oregon Laws 1971, c. 743, Art. 29, §§ 255–262.

"patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters," *ibid.*, the test adopted today requires that the material describe, "in a patently offensive way, sexual conduct specifically defined by the applicable state law." *Miller* v. *California, ante,* at 24. The third component of the *Memoirs* test is that the material must be "utterly without redeeming social value." 383 U. S., at 418. The Court's rephrasing requires that the work, taken as a whole, must be proved to lack "serious literary, artistic, political, or scientific value." *Miller, ante,* at 24.

The Court evidently recognizes that difficulties with the *Roth* approach necessitate a significant change of direction. But the Court does not describe its understanding of those difficulties, nor does it indicate how the restatement of the *Memoirs* test is in any way responsive to the problems that have arisen. In my view, the restatement leaves unresolved the very difficulties that compel our rejection of the underlying *Roth* approach, while at the same time contributing substantial difficulties of its own. The modification of the *Memoirs* test may prove sufficient to jeopardize the analytic underpinnings of the entire scheme. And today's restatement will likely have the effect, whether or not intended, of permitting far more sweeping suppression of sexually oriented expression, including expression that would almost surely be held protected under our current formulation.

Although the Court's restatement substantially tracks the three-part test announced in *Memoirs* v. *Massachusetts, supra,* it does purport to modify the "social value" component of the test. Instead of requiring, as did *Roth* and *Memoirs,* that state suppression be limited to materials utterly lacking in social value, the Court today

permits suppression if the government can prove that the materials lack "*serious* literary, artistic, political or scientific value." But the definition of "obscenity" as expression utterly lacking in social importance is the key to the conceptual basis of *Roth* and our subsequent opinions. In *Roth* we held that certain expression is obscene, and thus outside the protection of the First Amendment, precisely *because* it lacks even the slightest redeeming social value. See *Roth* v. *United States,* 354 U. S., at 484–485; [14] *Jacobellis* v. *Ohio,* 378 U. S., at 191; *Zeitlin* v. *Arnebergh,* 59 Cal. 2d 901, 920, 383 P. 2d 152, 165; cf. *New York Times Co.* v. *Sullivan,* 376 U. S. 254 (1964); *Garrison* v. *Louisiana,* 379 U. S. 64, 75 (1964); *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572 (1942); Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1. The Court's approach necessarily assumes that some works will be deemed obscene—even though they clearly have *some* social value—because the State was able to prove that the value, measured by some unspecified standard, was not sufficiently "serious" to warrant constitutional protection. That result is not merely inconsistent with our holding in *Roth;* it is nothing less than a rejection of the fundamental First Amendment premises and rationale of the *Roth* opinion and an invitation to widespread suppression of sexually oriented speech. Before today, the protections of the First Amendment have never been thought limited to expressions of *serious* literary or political value. See *Gooding* v. *Wilson,* 405 U. S. 518

[14] "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Roth* v. *United States, supra,* at 484.

(1972); *Cohen* v. *California*, 403 U. S. 15, 25–26 (1971); *Terminiello* v. *Chicago*, 337 U. S. 1, 4–5 (1949).

Although the Court concedes that "*Roth* presumed 'obscenity' to be 'utterly without redeeming social importance,' " it argues that *Memoirs* produced "a drastically altered test that called on the prosecution to prove a negative, *i. e.*, that the material was 'utterly without redeeming social value'—a burden virtually impossible to discharge under our criminal standards of proof." [15] One should hardly need to point out that under the third component of the Court's test the prosecution is still required to "prove a negative"—*i. e.*, that the material lacks serious literary, artistic, political, or scientific value. Whether it will be easier to prove that material lacks "serious" value than to prove that it lacks any value at all remains, of course, to be seen.

In any case, even if the Court's approach left undamaged the conceptual framework of *Roth*, and even if it clearly barred the suppression of works with at least some social value, I would nevertheless be compelled to reject it. For it is beyond dispute that the approach can have no ameliorative impact on the cluster of problems that grow out of the vagueness of our current standards. Indeed, even the Court makes no argument that the reformulation will provide fairer notice to booksellers, theater owners, and the reading and viewing public. Nor does the Court contend that the approach will provide clearer guidance to law enforcement officials or reduce the chill on protected expression. Nor, finally, does the Court suggest that the approach will mitigate to the slightest degree the institutional problems that have plagued this Court and the state and federal judiciary as a direct result of the uncertainty inherent in any definition of obscenity.

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[15] *Miller* v. *California*, *ante*, at 22.

Of course, the Court's restated *Roth* test does limit the definition of obscenity to depictions of physical conduct and explicit sexual acts. And that limitation may seem, at first glance, a welcome and clarifying addition to the *Roth-Memoirs* formula. But, just as the agreement in *Roth* on an abstract definition of obscenity gave little hint of the extreme difficulty that was to follow in attempting to apply that definition to specific material, the mere formulation of a "physical conduct" test is no assurance that it can be applied with any greater facility. The Court does not indicate how it would apply its test to the materials involved in *Miller* v. *California, supra,* and we can only speculate as to its application. But even a confirmed optimist could find little realistic comfort in the adoption of such a test. Indeed, the valiant attempt of one lower federal court to draw the constitutional line at depictions of explicit sexual conduct seems to belie any suggestion that this approach marks the road to clarity.[16] The Court surely demonstrates little sensitivity to our own institutional problems, much less the other vagueness-related difficulties, in establishing a system that requires us to consider whether a description of human genitals is sufficiently "lewd" to deprive it of constitutional protection; whether a sexual act is "ultimate"; whether the conduct depicted in materials before us fits within one of the categories of conduct whose depiction the State and Federal Governments have attempted to suppress; and a host of equally pointless inquiries. In addition, adoption of such a test does not, presumably, obviate the need for consideration of the

[16] *Huffman* v. *United States,* 152 U. S. App. D. C. 238, 470 F. 2d 386 (1971). The test apparently requires an effort to distinguish between "singles" and "duals," between "erect penises" and "semi-erect penises," and between "ongoing sexual activity" and "imminent sexual activity."

nuances of presentation of sexually oriented material, yet it hardly clarifies the application of those opaque but important factors.

If the application of the "physical conduct" test to pictorial material is fraught with difficulty, its application to textual material carries the potential for extraordinary abuse. Surely we have passed the point where the mere written description of sexual conduct is deprived of First Amendment protection. Yet the test offers no guidance to us, or anyone else, in determining which written descriptions of sexual conduct are protected, and which are not.

Ultimately, the reformulation must fail because it still leaves in this Court the responsibility of determining in each case whether the materials are protected by the First Amendment. The Court concedes that even under its restated formulation, the First Amendment interests at stake require "appellate courts to conduct an independent review of constitutional claims when necessary," *Miller* v. *California, ante,* at 25, citing Mr. Justice Harlan's opinion in *Roth,* where he stated, "I do not understand how the Court can resolve the constitutional problems now before it without making its own independent judgment upon the character of the material upon which these convictions were based." 354 U. S., at 498. Thus, the Court's new formulation will not relieve us of "the awesome task of making case by case at once the criminal and the constitutional law." [17] And the careful efforts of state and lower federal courts to apply the standard will remain an essentially pointless exercise, in view of the need for an ultimate decision by this Court. In addition, since the status of sexually oriented material will necessarily remain in doubt until final

[17] Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 81 (1960).

decision by this Court, the new approach will not diminish the chill on protected expression that derives from the uncertainty of the underlying standard. I am convinced that a definition of obscenity in terms of physical conduct cannot provide sufficient clarity to afford fair notice, to avoid a chill on protected expression, and to minimize the institutional stress, so long as that definition is used to justify the outright suppression of any material that is asserted to fall within its terms.

3. I have also considered the possibility of reducing our own role, and the role of appellate courts generally, in determining whether particular matter is obscene. Thus, we might conclude that juries are best suited to determine obscenity *vel non* and that jury verdicts in this area should not be set aside except in cases of extreme departure from prevailing standards. Or, more generally, we might adopt the position that where a lower federal or state court has conscientiously applied the constitutional standard, its finding of obscenity will be no more vulnerable to reversal by this Court than any finding of fact. Cf. *Interstate Circuit, Inc.* v. *Dallas,* 390 U. S., at 706–707 (separate opinion of Harlan, J.). While the point was not clearly resolved prior to our decision in *Redrup* v. *New York,* 386 U. S. 767 (1967),[18] it is implicit in that decision that the First Amendment requires

[18] Compare *Ginsberg* v. *New York,* 390 U. S. 629, 672 (1968) (Fortas, J., dissenting); *Jacobellis* v. *Ohio,* 378 U. S. 184, 187–190 (1964) (BRENNAN, J., joined by Goldberg, J.); *Manual Enterprises* v. *Day,* 370 U. S., at 488 (Harlan, J., joined by STEWART, J.); and *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 696–697 (1959) (Frankfurter, J., concurring); *id.,* at 708 (Harlan, J., joined by Frankfurter, J., and Whittaker, J., concurring), with *Jacobellis* v. *Ohio, supra,* at 202–203 (Warren, C. J., joined by Clark, J., dissenting); *Roth* v. *United States,* 354 U. S., at 492 n. 30; and *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436, 448 (1957) (BRENNAN, J., dissenting). See also *Walker* v. *Ohio,* 398 U. S. 434 (1970) (BURGER, C. J., dissenting).

an independent review by appellate courts of the constitutional fact of obscenity.[19] That result is required by principles applicable to the obscenity issue no less than to any other area involving free expression, see, *e. g.*, *New York Times Co.* v. *Sullivan*, 376 U. S., at 284–285, or other constitutional right.[20] In any event, even if the Constitution would permit us to refrain from judging for ourselves the alleged obscenity of particular materials, that approach would solve at best only a small part of our problem. For while it would mitigate the institutional stress produced by the *Roth* approach, it would neither offer nor produce any cure for the other vices of vagueness. Far from providing a clearer guide to permissible primary conduct, the approach would inevitably lead to even greater uncertainty and the consequent due process problems of fair notice. And the approach would expose much protected, sexually oriented expression to the vagaries of jury determinations. Cf. *Herndon* v. *Lowry*, 301 U. S. 242, 263 (1937). Plainly, the institutional gain would be more than offset by the unprecedented infringement of First Amendment rights.

4. Finally, I have considered the view, urged so forcefully since 1957 by our Brothers BLACK and DOUGLAS, that the First Amendment bars the suppression of any sexually oriented expression. That position would effect a sharp reduction, although perhaps not a total elimination, of the uncertainty that surrounds our current

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[19] Mr. Justice Harlan, it bears noting, considered this requirement critical for review of not only federal but state convictions, despite his view that the States were accorded more latitude than the Federal Government in defining obscenity. See, *e. g.*, *Roth*, *supra*, at 502–503 (separate opinion).

[20] See generally *Culombe* v. *Connecticut*, 367 U. S. 568, 603–606 (1961) (opinion of Frankfurter, J.); cf. *Crowell* v. *Benson*, 285 U. S. 22, 54–65 (1932); *Ng Fung Ho* v. *White*, 259 U. S. 276, 284–285 (1922).

approach. Nevertheless, I am convinced that it would achieve that desirable goal only by stripping the States of power to an extent that cannot be justified by the commands of the Constitution, at least so long as there is available an alternative approach that strikes a better balance between the guarantee of free expression and the States' legitimate interests.

V

Our experience since *Roth* requires us not only to abandon the effort to pick out obscene materials on a case-by-case basis, but also to reconsider a fundamental postulate of *Roth:* that there exists a definable class of sexually oriented expression that may be totally suppressed by the Federal and State Governments. Assuming that such a class of expression does in fact exist,[21] I am forced to conclude that the concept of "obscenity" cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms. Given these inevitable side effects of state efforts to suppress what is assumed to be *unprotected* speech, we must scrutinize with care the state interest that is asserted to justify the suppression. For in the absence of some very substantial interest in suppressing such speech, we can hardly condone the ill effects that seem to flow inevitably from the effort.[22]

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[21] See n. 9, *supra.*

[22] Cf. *United States* v. *O'Brien,* 391 U. S. 367, 376–377 (1968):

"This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize

Obscenity laws have a long history in this country. Most of the States that had ratified the Constitution by 1792 punished the related crime of blasphemy or profanity despite the guarantees of free expression in their constitutions, and Massachusetts expressly prohibited the "Composing, Writing, Printing or Publishing, of any Filthy Obscene or Prophane Song, Pamphlet, Libel or Mock-Sermon, in Imitation or in Mimicking of Preaching, or any other part of Divine Worship." Acts and Laws of Massachusetts Bay Colony (1726), Acts of 1711–1712, c. 1, p. 218. In 1815 the first reported obscenity conviction was obtained under the common law of Pennsylvania. See *Commonwealth* v. *Sharpless,* 2 S. & R. 91. A conviction in Massachusetts under its common law and colonial statute followed six years later. See *Commonwealth* v. *Holmes,* 17 Mass. 336 (1821). In 1821 Vermont passed the first state law proscribing the publication or sale of "lewd or obscene" material, Laws of Vermont, 1824, c. XXXII, No. 1, § 23, and federal legislation barring the importation of similar matter appeared in 1842. See Tariff Act of 1842, § 28, 5 Stat. 566. Although the number of early obscenity laws was small and their enforcement exceedingly lax, the situation significantly changed after about 1870 when Federal and State Governments, mainly as a result of the efforts

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the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." (Footnotes omitted.)

See also *Speiser* v. *Randall,* 357 U. S. 513 (1958).

of Anthony Comstock, took an active interest in the suppression of obscenity. By the end of the 19th century at least 30 States had some type of general prohibition on the dissemination of obscene materials, and by the time of our decision in *Roth* no State was without some provision on the subject. The Federal Government meanwhile had enacted no fewer than 20 obscenity laws between 1842 and 1956. See *Roth* v. *United States*, 354 U. S., at 482–483, 485; Report of the Commission on Obscenity and Pornography 300–301 (1970).

This history caused us to conclude in *Roth* "that the unconditional phrasing of the First Amendment [that 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . .'] was not intended to protect every utterance." 354 U. S., at 483. It also caused us to hold, as numerous prior decisions of this Court had assumed, see *id.*, at 481, that obscenity could be denied the protection of the First Amendment and hence suppressed because it is a form of expression "utterly without redeeming social importance," *id.*, at 484, as "mirrored in the universal judgment that [it] should be restrained . . . ." *Id.*, at 485.

Because we assumed—incorrectly, as experience has proved—that obscenity could be separated from other sexually oriented expression without significant costs either to the First Amendment or to the judicial machinery charged with the task of safeguarding First Amendment freedoms, we had no occasion in *Roth* to probe the asserted state interest in curtailing unprotected, sexually oriented speech. Yet, as we have increasingly come to appreciate the vagueness of the concept of obscenity, we have begun to recognize and articulate the state interests at stake. Significantly, in *Redrup* v. *New York*, 386 U. S. 767 (1967), where we set aside findings

of obscenity with regard to three sets of material, we pointed out that

> "[i]n none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See *Prince* v. *Massachusetts*, 321 U. S. 158; cf. *Butler* v. *Michigan*, 352 U. S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard* v. *Alexandria*, 341 U. S. 622; *Public Utilities Comm'n* v. *Pollak*, 343 U. S. 451. And in none was there evidence of the sort of 'pandering' which the Court found significant in *Ginzburg* v. *United States*, 383 U. S. 463." 386 U. S., at 769.

See *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970); *Stanley* v. *Georgia*, 394 U. S., at 567.[23]

The opinions in *Redrup* and *Stanley* reflected our emerging view that the state interests in protecting children and in protecting unconsenting adults may stand on a different footing from the other asserted state interests. It may well be, as one commentator has argued, that "exposure to [erotic material] is for some persons an intense emotional experience. A communication of this nature, imposed upon a person contrary to his wishes,

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[23] See also *Rabe* v. *Washington*, 405 U. S. 313, 317 (1972) (concurring opinion); *United States* v. *Reidel*, 402 U. S. 351, 360–362 (1971) (separate opinion); *Ginsberg* v. *New York*, 390 U. S. 629 (1968); *id.*, at 674–675 (dissenting opinion); *Redmond* v. *United States*, 384 U. S. 264, 265 (1966); *Ginzburg* v. *United States*, 383 U. S. 463 (1966); *id.*, at 498 n. 1 (dissenting opinion); *Memoirs* v. *Massachusetts*, 383 U. S. 413, 421 n. 8 (1966); *Jacobellis* v. *Ohio*, 378 U. S., at 195 (1964) (opinion of BRENNAN, J., joined by Goldberg, J.); *id.*, at 201 (dissenting opinion). See also Report of the Commission on Obscenity and Pornography 300–301 (1970) (focus of early obscenity laws on protection of youth).

has all the characteristics of a physical assault. . . . [And it] constitutes an invasion of his privacy . . . ." [24] But cf. *Cohen* v. *California,* 403 U. S., at 21–22. Similarly, if children are "not possessed of that full capacity for individual choice which is the presupposition of the First Amendment guarantees," *Ginsberg* v. *New York,* 390 U. S., at 649–650 (STEWART, J., concurring), then the State may have a substantial interest in precluding the flow of obscene materials even to consenting juveniles.[25] But cf. *id.,* at 673–674 (Fortas, J., dissenting).

But, whatever the strength of the state interests in protecting juveniles and unconsenting adults from exposure to sexually oriented materials, those interests cannot be asserted in defense of the holding of the Georgia Supreme Court in this case. That court assumed for the purposes of its decision that the films in issue were exhibited only to persons over the age of 21 who viewed them willingly and with prior knowledge of the nature of their contents. And on that assumption the state court held that the films could still be suppressed. The justification for the suppression must be found, therefore, in some independent interest in regulating the reading and viewing habits of consenting adults.

At the outset it should be noted that virtually all of the interests that might be asserted in defense of suppression, laying aside the special interests associated with distribution to juveniles and unconsenting adults, were also posited in *Stanley* v. *Georgia, supra,* where we held that the State could not make the "mere private possession of obscene material a crime." *Id.,* at 568. That decision presages the conclusions I reach here today.

In *Stanley* we pointed out that "[t]here appears to be

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[24] T. Emerson, The System of Freedom of Expression 496 (1970).

[25] See *ibid.*

little empirical basis for" the assertion that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence." *Id.*, at 566 and n. 9.[26] In any event, we added that "if the State is only concerned about printed or filmed materials inducing antisocial conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that '[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law . . . .' *Whitney* v. *California*, 274 U. S. 357, 378 (1927) (Brandeis, J., concurring)." *Id.*, at 566–567.

Moreover, in *Stanley* we rejected as "wholly inconsistent with the philosophy of the First Amendment," *id.*, at 566, the notion that there is a legitimate state concern in the "control [of] the moral content of a person's thoughts," *id.*, at 565, and we held that a State "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Id.*, at 566. That is not to say, of course, that a State must remain utterly indifferent to—and take no action bearing on—the morality of the community. The traditional descrip-

[26] Indeed, since *Stanley* was decided, the President's Commission on Obscenity and Pornography has concluded:

"In sum, empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime or sex delinquency." Report of the Commission on Obscenity and Pornography 27 (1970) (footnote omitted).

To the contrary, the Commission found that "[o]n the positive side, explicit sexual materials are sought as a source of entertainment and information by substantial numbers of American adults. At times, these materials also appear to serve to increase and facilitate constructive communication about sexual matters within marriage." *Id.*, at 53.

tion of state police power does embrace the regulation of morals as well as the health, safety, and general welfare of the citizenry. See, *e. g., Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 395 (1926). And much legislation—compulsory public education laws, civil rights laws, even the abolition of capital punishment—is grounded, at least in part, on a concern with the morality of the community. But the State's interest in regulating morality by suppressing obscenity, while often asserted, remains essentially unfocused and ill defined. And, since the attempt to curtail unprotected speech necessarily spills over into the area of protected speech, the effort to serve this speculative interest through the suppression of obscene material must tread heavily on rights protected by the First Amendment.

In *Roe* v. *Wade*, 410 U. S. 113 (1973), we held constitutionally invalid a state abortion law, even though we were aware of

> "the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion." *Id.*, at 116.

Like the proscription of abortions, the effort to suppress obscenity is predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion.[27] The existence of these assumptions can-

[27] See Henkin, Morals and the Constitution: The Sin of Obscenity, 63 Col. L. Rev. 391, 395 (1963).

not validate a statute that substantially undermines the guarantees of the First Amendment, any more than the existence of similar assumptions on the issue of abortion can validate a statute that infringes the constitutionally protected privacy interests of a pregnant woman.

If, as the Court today assumes, "a state legislature may . . . act on the . . . assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting and debasing impact leading to antisocial behavior," *ante,* at 63, then it is hard to see how state-ordered regimentation of our minds can ever be forestalled. For if a State, in an effort to maintain or create a particular moral tone, may prescribe what its citizens cannot read or cannot see, then it would seem to follow that in pursuit of that same objective a State could decree that its citizens must read certain books or must view certain films. Cf. *United States* v. *Roth,* 237 F. 2d 796, 823 (CA2 1956) (Frank, J., concurring). However laudable its goal—and that is obviously a question on which reasonable minds may differ—the State cannot proceed by means that violate the Constitution. The precise point was established a half century ago in *Meyer* v. *Nebraska,* 262 U. S. 390 (1923).

> "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

> "For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution." *Id.*, at 401–402.

Recognizing these principles, we have held that so-called thematic obscenity—obscenity which might persuade the viewer or reader to engage in "obscene" conduct—is not outside the protection of the First Amendment:

> "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is

> not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 688–689 (1959).

Even a legitimate, sharply focused state concern for the morality of the community cannot, in other words, justify an assault on the protections of the First Amendment. Cf. *Griswold* v. *Connecticut,* 381 U. S. 479 (1965); *Eisenstadt* v. *Baird,* 405 U. S. 438 (1972); *Loving* v. *Virginia,* 388 U. S. 1 (1967). Where the state interest in regulation of morality is vague and ill defined, interference with the guarantees of the First Amendment is even more difficult to justify.[28]

In short, while I cannot say that the interests of the State—apart from the question of juveniles and unconsenting adults—are trivial or nonexistent, I am compelled to conclude that these interests cannot justify the substantial damage to constitutional rights and to this Nation's judicial machinery that inevitably results

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[28] "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello* v. *Chicago,* 337 U. S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Tinker* v. *Des Moines School District,* 393 U. S. 503, 508–509 (1969). See also *Cohen* v. *California,* 403 U. S. 15, 23 (1971).

from state efforts to bar the distribution even of unprotected material to consenting adults. *NAACP* v. *Alabama,* 377 U. S. 288, 307 (1964); *Cantwell* v. *Connecticut,* 310 U. S., at 304. I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly "obscene" contents. Nothing in this approach precludes those governments from taking action to serve what may be strong and legitimate interests through regulation of the manner of distribution of sexually oriented material.

VI

Two Terms ago we noted that

> "there is developing sentiment that adults should have complete freedom to produce, deal in, possess and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential." *United States* v. *Reidel,* 402 U. S., at 357.

Nevertheless, we concluded that "the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances." *Ibid.* But the law of obscenity has been fashioned by this Court—and necessarily so under our duty to enforce the Constitution.

It is surely the duty of this Court, as expounder of the Constitution, to provide a remedy for the present unsatisfactory state of affairs. I do not pretend to have found a complete and infallible answer to what Mr. Justice Harlan called "the intractable obscenity problem." *Interstate Circuit, Inc.* v. *Dallas,* 390 U. S., at 704 (separate opinion). See also *Memoirs* v. *Massachusetts,* 383 U. S., at 456 (dissenting opinion). Difficult questions must still be faced, notably in the areas of distribution to juveniles and offensive exposure to unconsenting adults. Whatever the extent of state power to regulate in those areas,[29] it should be clear that the view I espouse today would introduce a large measure of clarity to this troubled area, would reduce the institutional pressure on this Court and the rest of the State and Federal Judiciary, and would guarantee fuller freedom of expression while leaving room for the protection of legitimate governmental interests. Since the Supreme Court of Georgia erroneously concluded that the State has power to suppress sexually oriented material even in the absence of distribution to juveniles or exposure to unconsenting adults, I would reverse that judgment and remand the case to that court for further proceedings not inconsistent with this opinion.

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[29] The Court erroneously states, *Miller* v. *California, ante,* at 27, that the author of this opinion "indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults . . . and to juveniles . . . ." I defer expression of my views as to the scope of state power in these areas until cases squarely presenting these questions are before the Court. See n. 9, *supra; Miller* v. *California, supra* (dissenting opinion).

Syllabus

KAPLAN *v.* CALIFORNIA

CERTIORARI TO THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

No. 71–1422. Argued October 19, 1972—Decided June 21, 1973

Petitioner, a proprietor of an "adult" bookstore, was convicted of violating a California obscenity statute by selling a plain-covered unillustrated book containing repetitively descriptive material of an explicitly sexual nature. Both sides offered testimony as to the nature and content of the book, but there was no "expert" testimony that the book was "utterly without redeeming social importance." The trial court used a state community standard in applying and construing the statute. The appellate court, affirming, held that the book was not protected by the First Amendment. *Held:*

1. Obscene material in book form is not entitled to First Amendment protection merely because it has no pictorial content. A State may control commerce in such a book, even distribution to consenting adults, to avoid the deleterious consequences it can reasonably conclude (conclusive proof is not required) result from the continuing circulation of obscene literature. See *Paris Adult Theatre I* v. *Slaton, ante,* p. 49. Pp. 118–120.

2. Appraisal of the nature of the book by "the contemporary community standards of the State of California" was an adequate basis for establishing whether the book here involved was obscene. See *Miller* v. *California, ante,* p. 15. P. 121.

3. When, as in this case, material is itself placed in evidence, "expert" state testimony as to its allegedly obscene nature, or other ancillary evidence of obscenity, is not constitutionally required. *Paris Adult Theatre I* v. *Slaton, supra.* P. 121.

4. The case is vacated and remanded so that the state appellate court can determine whether the state obscenity statute satisfies the constitutional standards newly enunciated in *Miller, supra.* P. 122.

23 Cal. App. 3d Supp. 9, 100 Cal. Rptr. 372, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., would vacate and remand for dismissal of the criminal complaint, *post,* p. 122. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post,* p. 122.

Stanley Fleishman argued the cause for petitioner. With him on the briefs were *David M. Brown* and *Sam Rosenwein.*

Ward Glen McConnell argued the cause for respondent. With him on the brief were *Roger Arnebergh* and *David M. Schacter.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to the Appellate Department of the Superior Court of California for the County of Los Angeles to review the petitioner's conviction for violation of California statutes regarding obscenity.

Petitioner was the proprietor of the Peek-A-Boo Bookstore, one of the approximately 250 "adult" bookstores in the city of Los Angeles, California.[1] On May 14, 1969, in response to citizen complaints, an undercover police officer entered the store and began to peruse several books and magazines. Petitioner advised the officer that the store "was not a library." The officer then asked petitioner if he had "any good sexy books." Petitioner replied that "all of our books are sexy" and exhibited a lewd photograph. At petitioner's recommendation, and after petitioner had read aloud a sample paragraph, the officer purchased the book Suite 69. On the basis of this sale, petitioner was convicted by a jury of violating California Penal Code § 311.2,[2] a misdemeanor.

The book, Suite 69, has a plain cover and contains no pictures. It is made up entirely of repetitive descriptions of physical, sexual conduct, "clinically" explicit

[1] The number of these stores was so estimated by both parties at oral argument. These stores purport to bar minors from the premises. In this case there is no evidence that petitioner sold materials to juveniles. Cf. *Miller* v. *California, ante,* at 18–20.

[2] The California Penal Code § 311.2, at the time of the commission of the alleged offense, read in relevant part:

"(a) Every person who knowingly: sends or causes to be sent, or

and offensive to the point of being nauseous; there is only the most tenuous "plot." Almost every conceivable variety of sexual contact, homosexual and heterosexual, is described. Whether one samples every 5th, 10th, or 20th page, beginning at any point or page at random, the content is unvarying.

At trial both sides presented testimony, by persons accepted to be "experts," as to the content and nature of the book. The book itself was received in evidence, and read, in its entirety, to the jury. Each juror inspected the book. But the State offered no "expert" evidence that the book was "utterly without socially redeeming value," or any evidence of "national standards."

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brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. . . ."

California Penal Code § 311, at the time of the commission of the alleged offense, provided as follows:

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, *i. e.*, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

On appeal, the Appellate Department of the Superior Court of California for the County of Los Angeles affirmed petitioner's conviction. Relying on the dissenting opinions in *Jacobellis* v. *Ohio*, 378 U. S. 184, 199, 203 (1964), and MR. JUSTICE WHITE's dissent in *Memoirs* v. *Massachusetts*, 383 U. S. 413, 462 (1966), it concluded that evidence of a "national" standard of obscenity was not required. It also decided that the State did not always have to present "expert" evidence that the book lacked "socially redeeming value," and that "[i]n light . . . of the circumstances surrounding the sale" and the nature of the book itself, there was sufficient evidence to sustain petitioner's conviction. Finally, the state court considered petitioner's argument that the book was not "obscene" as a matter of constitutional law. Pointing out that petitioner was arguing, in part, that all books were constitutionally protected in an absolute sense, it rejected that thesis. On "independent review," it concluded "Suite 69 appeals to a prurient interest in sex and is beyond the customary limits of candor within the State of California." It held that the book was not protected by the First Amendment. We agree.

This case squarely presents the issue of whether expression by words alone can be legally "obscene" in the sense of being unprotected by the First Amendment.[3] When

[3] This Court, since *Roth* v. *United States*, 354 U. S. 476 (1957), has only once held books to be obscene. That case was *Mishkin* v. *New York*, 383 U. S. 502 (1966), and the books involved were very similar in content to Suite 69. But most of the *Mishkin* books, if not all, were illustrated. See *id.*, at 505, 514–515. Prior to *Roth*, this Court affirmed, by an equally divided Court, a conviction for sale of an unillustrated book. *Doubleday & Co., Inc.* v. *New York*, 335 U. S. 848 (1948). This Court has always rigorously scrutinized judgments involving books for possible violation of First Amendment rights, and has regularly reversed convictions on that basis. See *Childs* v. *Oregon*, 401 U. S. 1006 (1971); *Walker* v. *Ohio*, 398 U. S. 434 (1970); *Keney* v. *New York*, 388 U. S. 440 (1967); *Friedman* v. *New York*, 388 U. S. 441

the Court declared that obscenity is not a form of expression protected by the First Amendment, no distinction was made as to the medium of the expression. See *Roth* v. *United States*, 354 U. S. 476, 481–485 (1957). Obscenity can, of course, manifest itself in conduct, in the pictorial representation of conduct, or in the written and oral description of conduct. The Court has applied similarly conceived First Amendment standards to moving pictures, to photographs, and to words in books. See *Freedman* v. *Maryland*, 380 U. S. 51, 57 (1965); *Jacobellis* v. *Ohio*, *supra*, at 187–188; *Times Film Corp.* v. *Chicago*, 365 U. S. 43, 46 (1961); *id.*, at 51 (Warren, C. J., dissenting); *Kingsley Pictures Corp.* v. *Regents*, 360 U. S. 684, 689–690 (1959); *Superior Films, Inc.* v. *Dept. of Education*, 346 U. S. 587, 589 (1954) (DOUGLAS, J., concurring); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 503 (1952).

Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures of flagrant human conduct. A book seems to have a different and preferred place in our hierarchy of values, and so it should be. But this generalization, like so many, is qualified by the book's content. As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amend-

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(1967); *Sheperd* v. *New York*, 388 U. S. 444 (1967); *Avansino* v. *New York*, 388 U. S. 446 (1967); *Corinth Publications, Inc.* v. *Wesberry*, 388 U. S. 448 (1967); *Books, Inc.* v. *United States*, 388 U. S. 449 (1967); *A Quantity of Books* v. *Kansas*, 388 U. S. 452 (1967); *Redrup* v. *New York*, 386 U. S. 767 (1967); *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966); *Tralins* v. *Gerstein*, 378 U. S. 576 (1964); *Grove Press, Inc.* v. *Gerstein*, 378 U. S. 577 (1964); *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961); *Smith* v. *California*, 361 U. S. 147 (1959); *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436 (1957).

ment protection until they collide with the long-settled position of this Court that obscenity is not protected by the Constitution. *Miller* v. *California, ante,* at 23–25; *Roth* v. *United States, supra,* at 483–485.

For good or ill, a book has a continuing life. It is passed hand to hand, and we can take note of the tendency of widely circulated books of this category to reach the impressionable young and have a continuing impact.[4] A State could reasonably regard the "hard core" conduct described by Suite 69 as capable of encouraging or causing antisocial behavior, especially in its impact on young people. States need not wait until behavioral experts or educators can provide empirical data before enacting controls of commerce in obscene materials unprotected by the First Amendment or by a constitutional right to privacy. We have noted the power of a legislative body to enact such regulatory laws on the basis of unprovable assumptions. See *Paris Adult Theatre I* v. *Slaton, ante,* at 60–63.

Prior to trial, petitioner moved to dismiss the complaint on the basis that sale of sexually oriented material to consenting adults is constitutionally protected. In connection with this motion only, the prosecution stipulated that it did not claim that petitioner either disseminated any material to minors or thrust it upon the general public. The trial court denied the motion. Today, this Court, in *Paris Adult Theatre I* v. *Slaton, ante,* at 68–69, reaffirms that commercial exposure and sale of obscene materials to anyone, including consenting adults, is subject to state regulation. See also *United States* v. *Orito, post,* at 141–144; *United States* v. *12 200-ft. Reels of Film, post,* at 128; *United States* v. *Thirty-seven Photographs,* 402 U. S. 363, 376 (1971) (opinion of

[4] See *Paris Adult Theatre I* v. *Slaton, ante,* at 58 n. 7; Report of the Commission on Obscenity and Pornography 401 (1970) (Hill-Link Minority Report).

WHITE, J.); *United States* v. *Reidel*, 402 U. S. 351, 355–356 (1971). The denial of petitioner's motion was, therefore, not error.

At trial the prosecution tendered the book itself into evidence and also tendered, as an expert witness, a police officer in the vice squad. The officer testified to extensive experience with pornographic materials and gave his opinion that Suite 69, taken as a whole, predominantly appealed to the prurient interest of the average person in the State of California, "applying contemporary standards," and that the book went "substantially beyond the customary limits of candor" in the State of California. The witness explained specifically how the book did so, that it was a purveyor of perverted sex for its own sake. No "expert" state testimony was offered that the book was obscene under "national standards," or that the book was "utterly without redeeming social importance," despite "expert" defense testimony to the contrary.

In *Miller* v. *California*, *ante*, p. 15, the Court today holds that the " 'contemporary community standards of the State of California,' " as opposed to "national standards," are constitutionally adequate to establish whether a work is obscene. We also reject in *Paris Adult Theatre I* v. *Slaton*, *ante*, p. 49, any constitutional need for "expert" testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity, once the allegedly obscene material itself is placed in evidence. *Paris Adult Theatre I*, *ante*, at 56. The defense should be free to introduce appropriate expert testimony, see *Smith* v. *California*, 361 U. S. 147, 164–165 (1959) (Frankfurter, J., concurring), but in "the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question." *Ginzburg* v. *United States*, 383 U. S. 463, 465 (1966). See *United States* v. *Groner*, 479

F. 2d 577, 579–586 (CA5 1973). On the record in this case, the prosecution's evidence was sufficient, as a matter of federal constitutional law, to support petitioner's conviction.[5]

Both *Miller* v. *California, supra,* and this case involve California obscenity statutes. The judgment of the Appellate Department of the Superior Court of California for the County of Los Angeles is vacated, and the case remanded to that court for further proceedings not inconsistent with this opinion, *Miller* v. *California, supra,* and *Paris Adult Theatre I* v. *Slaton, supra.* See *United States* v. *12 200-ft. Reels of Film, post,* at 130 n. 7, decided today.

Vacated and remanded.

MR. JUSTICE DOUGLAS would vacate and remand for dismissal of the criminal complaint under which petitioner was found guilty because "obscenity" as defined by the California courts and by this Court is too vague to satisfy the requirements of due process. See *Miller* v. *California, ante,* p. 37 (DOUGLAS, J., dissenting).

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

I would reverse the judgment of the Appellate Department of the Superior Court of California and remand the case for further proceedings not inconsistent with my dissenting opinion in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73. See my dissent in *Miller* v. *California, ante,* p. 47.

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[5] As the prosecution's introduction of the book itself into evidence was adequate, as a matter of federal constitutional law, to establish the book's obscenity, we need not consider petitioner's claim that evidence of pandering was wrongly considered on appeal to support the jury finding of obscenity. Petitioner's additional claims that his conviction was affirmed on the basis of a "theory" of "pandering" not considered at trial and that he was subjected to retroactive application of a state statute are meritless on the record.

Syllabus

UNITED STATES *v.* 12 200-FT. REELS OF SUPER 8MM. FILM ET AL. (PALADINI, CLAIMANT)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 70–2. Argued January 19, 1972—Reargued November 7, 1972—Decided June 21, 1973

Congress, which has broad powers under the Commerce Clause to prohibit importation into this country of contraband, may constitutionally proscribe the importation of obscene matter, notwithstanding that the material is for the importer's private, personal use and possession. Cf. *United States* v. *Orito*, *post*, p. 139. *Stanley* v. *Georgia*, 394 U. S. 557, distinguished. The District Court consequently erred in holding 19 U. S. C. § 1305 (a) unconstitutional. This case is remanded to the District Court for reconsideration in light of the First Amendment standards newly enunciated by this Court in *Miller* v. *California*, *ante*, p. 15, which equally apply to federal legislation, and this opinion. Pp. 124–130.

Vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 130. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 138.

Solicitor General Griswold reargued the cause for the United States. With him on the brief were *Assistant Attorney General Wilson*, *Deputy Solicitor General Greenawalt*, and *Sidney M. Glazer*.

Thomas H. Kuchel, by invitation of the Court, 404 U. S. 813, reargued the cause as *amicus curiae* in support of the judgment below. With him on the brief were *Edward Weinberg*, *George Miron*, and *Ezra C. Levine*.*

*Briefs of *amici curiae* urging affirmance were filed by *Melvin L. Wulf* and *Joel M. Gora* for the American Civil Liberties Union; by

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to review a summary decision of the United States District Court for the Central District of California holding that § 305(a) of the Tariff Act of 1930, 46 Stat. 688, as amended, 19 U. S. C. § 1305 (a) was "unconstitutional on its face" and dismissing a forfeiture action brought under that statute.[1] The statute provides in pertinent part:

> "All persons are prohibited from importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral . . . . No such articles whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the appropriate customs officer that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided . . . . *Provided further,* That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may,

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Joel Hirschhorn, Ralph J. Schwarz, Jr., and *Mel S. Friedman* for the First Amendment Lawyers' Assn.; and by *Harvey A. Silverglate* for Christopher W. Walker.

[1] The United States brought this direct appeal under 28 U. S. C. § 1252. See *Clark* v. *Gabriel,* 393 U. S. 256, 258 (1968).

in his discretion, admit such classics or books only when imported for noncommercial purposes."

On April 2, 1970, the claimant Paladini sought to carry movie films, color slides, photographs, and other printed and graphic material into the United States from Mexico. The materials were seized as being obscene by customs officers at a port of entry, Los Angeles Airport, and made the subject of a forfeiture action under 19 U. S. C. § 1305 (a). The District Court dismissed the Government's complaint, relying on the decision of a three-judge district court in *United States* v. *Thirty-seven Photographs,* 309 F. Supp. 36 (CD Cal. 1970), which we later reversed, 402 U. S. 363 (1971). That case concerned photographs concededly imported for commercial purposes. The narrow issue directly presented in this case, and not in *Thirty-seven Photographs,* is whether the United States may constitutionally prohibit importation of obscene material which the importer claims is for private, personal use and possession only.[2]

Import restrictions and searches of persons or packages at the national borders rest on different considerations and different rules of constitutional law from domestic regulations. The Constitution gives Congress broad, comprehensive powers "[t]o regulate Commerce with foreign Nations." Art. I, § 8, cl. 3. Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry. See *United States* v. *Thirty-seven Photographs,* 402 U. S., at 376–377

[2] On the day the complaint was dismissed, claimant filed an affidavit with the District Court stating that none of the seized materials "were imported by me for any commercial purpose but were intended to be used and possessed by me personally." In conjunction with the Government's motion to stay the order of dismissal, denied below but granted by MR. JUSTICE BRENNAN, the Government conceded it had no evidence to contradict claimant's affidavit and did not "contest the fact that this was a private importation."

(opinion of WHITE, J.); *Carroll* v. *United States*, 267 U. S. 132, 154 (1925); *Brolan* v. *United States*, 236 U. S. 216, 218 (1915); *Boyd* v. *United States*, 116 U. S. 616, 623–624 (1886); *Alexander* v. *United States*, 362 F. 2d 379, 382 (CA9), cert. denied, 385 U. S. 977 (1966). The plenary power of Congress to regulate imports is illustrated in a holding of this Court which sustained the validity of an Act of Congress prohibiting the importation of "any film or other pictorial representation of any prize fight . . . designed to be used or [that] may be used for purposes of public exhibition" [3] in view of "the complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles . . . . *Buttfield* v. *Stranahan*, 192 U. S. 470; *The Abby Dodge*, 223 U. S. 166, 176; *Brolan* v. *United States*, 236 U. S. 216." *Weber* v. *Freed*, 239 U. S. 325, 329 (1915).

Claimant relies on the First Amendment and our decision in *Stanley* v. *Georgia*, 394 U. S. 557 (1969). But it is now well established that obscene material is not protected by the First Amendment. *Roth* v. *United States*, 354 U. S. 476, 485 (1957), reaffirmed today in *Miller* v. *California*, *ante*, at 23. As we have noted in *United States* v. *Orito*, *post*, at 141–143, also decided today, *Stanley* depended, not on any First Amendment right to purchase or possess obscene materials, but on the right to privacy in the home. Three concurring Justices indicated that the case could have been disposed of on Fourth Amendment grounds without reference to the nature of the materials. *Stanley* v. *Georgia*, *supra*, at 569 (STEWART, J., joined by BRENNAN and WHITE, JJ., concurring).

In particular, claimant contends that, under *Stanley*, the right to possess obscene material in the privacy of

[3] Act of July 31, 1912, c. 263, § 1, 37 Stat. 241.

the home creates a right to acquire it or import it from another country. This overlooks the explicitly narrow and precisely delineated privacy right on which *Stanley* rests. That holding reflects no more than what Mr. Justice Harlan characterized as the law's "solicitude to protect the privacies of the life within [the home]." *Poe* v. *Ullman,* 367 U. S. 497, 551 (1961) (dissenting opinion).[4] The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance.[5] This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond." Perspectives may change, but our conclusion is that *Stanley* represents such a line of demarcation; and it is not unreasonable to assume that had it not been so delineated, *Stanley* would not be the law today. See *United States* v. *Reidel,* 402 U. S. 351, 354–356 (1971); *id.,* at 357–360 (Harlan, J., concurring). See also *Miller* v. *United States,* 431 F. 2d 655, 657 (CA9 1970); *United States* v. *Fragus,* 428 F. 2d

[4] Nor can claimant rely on any other sphere of constitutionally protected privacy, such as that which encompasses the intimate medical problems of family, marriage, and motherhood. See *Paris Adult Theatre I* v. *Slaton, ante,* at 65–67, and *United States* v. *Orito, post,* at 142–143.

[5] Mr. Justice Holmes had this kind of situation in mind when he said:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355 (1908).

1211, 1213 (CA5 1970); *United States* v. *Melvin*, 419 F. 2d 136, 139 (CA4 1969); *Gable* v. *Jenkins*, 309 F. Supp. 998, 1000–1001 (ND Ga. 1969), aff'd, 397 U. S. 592 (1970). Cf. *Karalexis* v. *Byrne*, 306 F. Supp. 1363, 1366 (Mass. 1969), vacated on other grounds, 401 U. S. 216 (1971).

We are not disposed to extend the precise, carefully limited holding of *Stanley* to permit importation of admittedly obscene material simply because it is imported for private use only. To allow such a claim would be not unlike compelling the Government to permit importation of prohibited or controlled drugs for private consumption as long as such drugs are not for public distribution or sale. We have already indicated that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others. *United States* v. *Thirty-seven Photographs, supra,* at 376 (opinion of WHITE, J.), and *United States* v. *Reidel, supra,* at 355. Nor is there any correlative right to transport obscene material in interstate commerce. *United States* v. *Orito, post,* at 142–144.[6] It follows that *Stanley* does not permit one to go abroad and bring such material into the country for private purposes. "*Stanley*'s emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not

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[6] In *Caminetti* v. *United States*, 242 U. S. 470 (1917), and *Hoke* v. *United States*, 227 U. S. 308 (1913), this Court upheld the "so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one State to another for immoral ends, *whether for commercial purposes or otherwise*, . . . because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage, and other forms of immorality." *Brooks* v. *United States*, 267 U. S. 432, 437 (1925) (emphasis added).

a traveler's home." *United States* v. *Thirty-seven Photographs, supra,* at 376 (opinion of WHITE, J.).

This is not to say that Congress could not allow an exemption for private use, with or without appropriate guarantees such as bonding, or permit the transportation of obscene material under conditions insuring privacy. But Congress has not seen fit to do so, and the holding in *Roth* v. *United States, supra,* read with the narrow holding of *Stanley* v. *Georgia, supra,* does not afford a basis for claimant's arguments. The Constitution does not compel, and Congress has not authorized, an exception for private use of obscene material. See *Paris Adult Theatre I* v. *Slaton, ante,* at 64–69; *United States* v. *Reidel, supra,* at 357; *Memoirs* v. *Massachusetts,* 383 U. S. 413, 462 (1966) (WHITE, J., dissenting).

The attack on the overbreadth of the statute is thus foreclosed, but, independently, we should note that it is extremely difficult to control the uses to which obscene material is put once it enters this country. Even single copies, represented to be for personal use, can be quickly and cheaply duplicated by modern technology thus facilitating wide-scale distribution. While it is true that a large volume of obscene material on microfilm could rather easily be smuggled into the United States by mail, or otherwise, and could be enlarged or reproduced for commercial purposes, Congress is not precluded from barring some avenues of illegal importation because avenues exist that are more difficult to regulate. See *American Power & Light Co.* v. *SEC,* 329 U. S. 90, 99–100 (1946).

As this case came to us on the District Court's summary dismissal of the forfeiture action, no determination of the obscenity of the materials involved has been made. We have today arrived at standards for testing the constitutionality of state legislation regulating obscenity.

See *Miller* v. *California, ante,* at 23–25. These standards are applicable to federal legislation.[7] The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion, *Miller* v. *California, supra,* and *United States* v. *Orito, supra,* both decided today.

Vacated and remanded.

MR. JUSTICE DOUGLAS, dissenting.

I know of no constitutional way by which a book, tract, paper, postcard, or film may be made contraband because of its contents. The Constitution never purported to give the Federal Government censorship or oversight over literature or artistic productions, save as they might be governed by the Patent and Copyright Clause of Art. I, § 8, cl. 8, of the Constitution.[1] To be

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[7] We further note that, while we must leave to state courts the construction of state legislation, we do have a duty to authoritatively construe federal statutes where "'a serious doubt of constitutionality is raised'" and "'a construction of the statute is fairly possible by which the question may be avoided.'" *United States* v. *Thirty-seven Photographs,* 402 U. S. 363, 369 (1971) (opinion of WHITE, J.), quoting from *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932). If and when such a "serious doubt" is raised as to the vagueness of the words "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" as used to describe regulated material in 19 U. S. C. § 1305 (a) and 18 U. S. C. § 1462, see *United States* v. *Orito, post,* at 140 n. 1, we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller* v. *California, ante,* at 25. See *United States* v. *Thirty-seven Photographs, supra,* at 369–374 (opinion of WHITE, J.). Of course, Congress could always define other specific "hard core" conduct.

[1] Even the copyright power is limited by the freedoms secured by the First Amendment. *Lee* v. *Runge,* 404 U. S. 887, 892–893 (DOUGLAS, J., dissenting); Nimmer, Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?, 17 U. C. L. A. L. Rev. 1180 (1970).

sure, the Colonies had enacted statutes which limited the freedom of speech, see *Roth* v. *United States,* 354 U. S. 476, 482–484, nn. 10–13, and in the early 19th century the States punished obscene libel as a common-law crime. *Knowles* v. *State,* 3 Day 103 (Conn. 1808) (signs depicting "monster"); *Commonwealth* v. *Holmes,* 17 Mass. 336 (1821) (John Cleland's Memoirs of a Woman of Pleasure); *State* v. *Appling,* 25 Mo. 315, 316 (1857) (utterance of words "too vulgar to be inserted in this opinion"); *Commonwealth* v. *Sharpless,* 2 S. & R. 91, 92 (1815) ("lewd, wicked, scandalous, infamous, . . . and indecent posture with a woman").

To construe this history, as this Court does today in *Miller* v. *California, ante,* p. 15, as qualifying the plain import of the First Amendment is both a *non sequitur* and a disregard of the Tenth Amendment.

"[W]hatever may [have been] the form which the several States . . . adopted in making declarations in favor of particular rights," James Madison, the author of the First Amendment, tells us, "the great object in view [was] to limit and qualify the powers of [the Federal] Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode." 1 Annals of Cong. 437. Surely no one should argue that the retention by the States of vestiges of established religions after the enactment of the Establishment and Free Exercise Clauses saps these clauses of their meaning.[2] Yet it was precisely upon such reasoning that this Court, in *Roth,* exempted the bawdry from the protection of the First Amendment.

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[2] Thus, the suggestion that most of the States that had ratified the Constitution punished blasphemy or profanity, is irrelevant to our inquiry here.

When it was enacted, the Bill of Rights applied only to the Federal Government, *Barron* v. *Mayor of Baltimore*, 7 Pet. 243, and the Tenth Amendment reserved the residuum of power to the States and the people. That the States, at some later date, may have exercised this reserved power in the form of laws restricting expression in no wise detracts from the express prohibition of the First Amendment. Only when the Fourteenth Amendment was passed did it become even possible to argue that through it the First Amendment became applicable to the States. But that goal was not attained until the ruling of this Court in 1931 that the reach of the Fourteenth Amendment included the First Amendment. See *Stromberg* v. *California*, 283 U. S. 359, 368.

At the very beginning, however, the First Amendment applied only to the Federal Government and there is not the slightest evidence that the Framers intended to put the newly created federal regime into the role of ombudsman over literature. Tying censorship to the movement of literature or films in interstate commerce or into foreign commerce would have been an easy way for a government of delegated powers to impair the liberty of expression. It was to bar such suppression that we have the First Amendment. I dare say Jefferson and Madison would be appalled at what the Court espouses today.

The First Amendment was the product of a robust, not a prudish, age. The four decades prior to its enactment "saw the publication, virtually without molestation from any authority, of two classics of pornographic literature." D. Loth, The Erotic in Literature 108 (1961). In addition to William King's The Toast, there was John Cleland's Memoirs of a Woman of Pleasure which has been described as the "most important work of genuine pornography that has been published in English . . . ." L. Markun, Mrs. Grundy 191 (1930). In England, Harris' List of Covent Garden Ladies, a catalog

used by prostitutes to advertise their trade, enjoyed open circulation. N. St. John-Stevas, Obscenity and the Law 25 (1956). Bibliographies of pornographic literature list countless erotic works which were published in this time. See, *e. g.*, A. Craig, Suppressed Books (1963); P. Fraxi, Catena Librorum Tacendorum (1885); W. Gallichan, The Poison of Prudery (1929); D. Loth, *supra;* L. Markun, *supra.* This was the age when Benjamin Franklin wrote his "Advice to a Young Man on Choosing a Mistress" and "A Letter to the Royal Academy at Brussels." "When the United States became a nation, none of the fathers of the country were any more concerned than Franklin with the question of pornography. John Quincy Adams had a strongly puritanical bent for a man of his literary interests, and even he wrote of Tom Jones that it was 'one of the best novels in the language.'" Loth, *supra,* at 120. It was in this milieu that Madison admonished against any "distinction between the freedom and licentiousness of the press." S. Padover, The Complete Madison 295 (1953). The Anthony Comstocks, the Thomas Bowdlers and Victorian hypocrisy—the predecessors of our present obscenity laws—had yet to come upon the stage.[3]

[3] Separating the worthwhile from the worthless has largely been a matter of individual taste because significant governmental sanctions against obscene literature are of relatively recent vintage, not having developed until the Victorian Age of the mid-19th century. N. St. John-Stevas, Obscenity and the Law 1–85 (1956). See T. Emerson, The System of Freedom of Expression 468–469 (1970); J. Paul & M. Schwartz, Federal Censorship, c. 1 (1961); Report of the Commission on Obscenity and Pornography 349–354 (1970). In this country, the first federal prohibition on obscenity was not until the Tariff Act of 1842, c. 270, § 28, 5 Stat. 566. England, which gave us the infamous Star Chamber and a history of licensing of publishing, did not raise a statutory bar to the importation of obscenity until 1853, Customs Consolidation Act, 16 & 17 Vict., c. 107, and waited until 1857 to enact a statute which banned obscene literature outright. Lord Campbell's Act, 20 & 21 Vict., c. 83.

Julius Goebel, our leading expert on colonial law, does not so much as allude to punishment of obscenity.[4] J. Goebel, Development of Legal Institutions (1946); J. Goebel, Felony and Misdemeanor (1937); J. Goebel & T. Naughton, Law Enforcement in Colonial New York (1944).

Nor is there any basis in the legal history antedating the First Amendment for the creation of an obscenity exception. *Memoirs* v. *Massachusetts*, 383 U. S. 413, 424 (DOUGLAS, J., concurring). The first reported case involving obscene conduct was not until 1663. There, the defendant was fined for "shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Convent Garden, contra pacem, and to the scandal of the Government." *Sir Charles Sydlyes Case*, 83 Eng. Rep. 1146–1147 (K. B. 1663). Rather than being a fountainhead for a body of law proscribing obscene literature, later courts viewed this case simply as an instance of assault, criminal breach of the peace, or indecent exposure. *E. g.*, *Bradlaugh* v. *Queen*, L. R. 3 Q. B. 569, 634 (1878); *Rex* v. *Curl*, 93 Eng. Rep. 849, 851 (K. B. 1727) (Fortescue, J., dissenting).

The advent of the printing press spurred censorship in England, but the ribald and the obscene were not, at first, within the scope of that which was officially banned. The censorship of the Star Chamber and the licensing of

[4] The only colonial statute mentioning the word "obscene" was Acts and Laws of the Province of Mass. Bay, c. CV, § 8 (1712), in Mass. Bay Colony Charter & Laws 399 (1814). It did so, however, in the context of "composing, writing, printing or publishing . . . any filthy, obscene, or profane song, pamphlet, libel or mock sermon, in imitation or in mimicking of preaching, or any other part of divine worship" and must, therefore, be placed with the other colonial blasphemy laws. *E. g.*, An Act for the Punishment of divers capital and other Felonies, Conn. Acts, Laws, Charter & Articles of Confederation 66, 67 (1784); Act of 1723, c. 16, § 1, Digest of the Laws of Md. 92 (Herty 1799).

books under the Tudors and Stuarts was aimed at the blasphemous or heretical, the seditious or treasonous. At that date, the government made no effort to prohibit the dissemination of obscenity. Rather, obscene literature was considered to raise a moral question properly cognizable only by ecclesiastical, and not the common-law, courts.[5] "A crime that shakes religion (*a*), as profaneness on the stage, &c. is indictable (*b*); but writing an obscene book, as that intitled, 'The Fifteen Plagues of a Maidenhead,' is not indictable, but punishable only in the Spiritual Court (*c*)." *Queen* v. *Read,* 88 Eng. Rep. 953 (K. B. 1707). To be sure, *Read* was ultimately overruled and the crime of obscene libel established. *Rex* v. *Curl, supra.* It is noteworthy, however, that the only reported cases of obscene libel involved politically unpopular defendants. *Ibid.; Rex* v. *Wilkes,* 98 Eng. Rep. 327 (K. B. 1770).

In any event, what we said in *Bridges* v. *California,* 314 U. S. 252, 264–265, would dispose of any argument that earlier restrictions on free expression should be read into the First Amendment:

> "[T]o assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' . . .
>
> "More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment, said: 'Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience,

[5] Lord Coke's De Libellis Famosis, 77 Eng. Rep. 250 (1605), for example, was the definitive statement of the common law of libel but made no mention of the misdemeanor of obscene libel.

> come in question in that body [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution.' "

This Court has nonetheless engrafted an exception upon the clear meaning of words written in the 18th century. But see *ibid.*; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 249.

Our efforts to define obscenity have not been productive of meaningful standards. What is "obscene" is highly subjective, varying from judge to judge, from juryman to juryman.

> "The fireside banter of Chaucer's Canterbury Pilgrims was disgusting obscenity to Victorian-type moralists whose co-ed granddaughters shock the Victorian-type moralists of today. Words that are obscene in England have not a hint of impropriety in the United States, and *vice versa*. The English language is full of innocent words and phrases with obscene ancestry." I. Brant, The Bill of Rights 490 (1965).

So speaks our leading First Amendment historian; and he went on to say that this Court's decisions "seemed to multiply standards instead of creating one." *Id.*, at 491. The reason is not the inability or mediocrity of judges.

> "What is the reason for this multiple sclerosis of the judicial faculty? It is due to the fact stated above, that obscenity is a matter of taste and social custom, not of fact." *Id.*, at 491–492.

Taste and custom are part of it; but, as I have said on other occasions,[6] the neuroses of judges, lawmakers, and of the so-called "experts" who have taken the place of Anthony Comstock, also play a major role.

Finally, it is ironic to me that in this Nation many pages must be written and many hours spent to explain why a person who can read whatever he desires, *Stanley* v. *Georgia,* 394 U. S. 557, may not without violating a law carry that literature in his briefcase or bring it home from abroad. Unless there is that ancillary right, one's *Stanley* rights could be realized, as has been suggested, only if one wrote or designed a tract in his attic and printed or processed it in his basement, so as to be able to read it in his study. *United States* v. *Thirty-seven Photographs,* 402 U. S. 363, 382 (Black, J., dissenting).

Most of the items that come this way denounced as "obscene" are in my view trash. I would find few, if any, that had by my standards any redeeming social value. But what may be trash to me may be prized by others.[7] Moreover, by what right under the Constitution do five of us have to impose our set of values on the literature of the day? There is danger in that course, the danger of bending the popular mind to new norms of conformity. There is, of course, also danger in tolerance, for tolerance often leads to robust or even ribald productions. Yet that is part of the risk of the First Amendment.

Irving Brant summed the matter up:

> "Blessed with a form of government that requires universal liberty of thought and expression, blessed with a social and economic system built on that

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[6] *Ginsberg* v. *New York,* 390 U. S. 629, 655–656, 661–671 (DOUGLAS, J., dissenting).

[7] *Ginzburg* v. *United States,* 383 U. S. 463, 491 (DOUGLAS, J., dissenting).

same foundation, the American people have created the danger they fear by denying to themselves the liberties they cherish." Brant, *supra,* at 493.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

We noted probable jurisdiction to consider the constitutionality of 19 U. S. C. § 1305(a), which prohibits all persons from "importing into the United States from any foreign country . . . any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral." Pursuant to that provision, customs authorities at Los Angeles seized certain movie films, color slides, photographs, and other materials, which claimant sought to import into the United States. A complaint was filed in the United States District Court for the Central District of California for forfeiture of these items as obscene. Relying on the decision in *United States* v. *Thirty-seven Photographs,* 309 F. Supp. 36 (CD Cal. 1969), which held the statute unconstitutional on its face, the District Court dismissed the complaint. Although we subsequently reversed the decision in *United States* v. *Thirty-seven Photographs,* 402 U. S. 363 (1971), the reasoning that led us to uphold the statute is no longer viable, under the view expressed in my dissent today in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73. Whatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is, in my view, clearly overbroad and unconstitutional on its face. See my dissent in *Miller* v. *California, ante,* at 47. I would therefore affirm the judgment of the District Court.

Syllabus

UNITED STATES *v.* ORITO

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

No. 70-69. Argued January 19, 1972—Reargued November 7, 1972—Decided June 21, 1973

Appellee was charged with knowingly transporting obscene material by common carrier in interstate commerce, in violation of 18 U. S. C. § 1462. The District Court granted his motion to dismiss, holding the statute unconstitutionally overbroad for failing to distinguish between public and nonpublic transportation. Appellee relies on *Stanley* v. *Georgia*, 394 U. S. 557. *Held:* Congress has the power to prevent obscene material, which is not protected by the First Amendment, from entering the stream of commerce. The zone of privacy that *Stanley* protected does not extend beyond the home. See *United States* v. *12 200-ft. Reels of Film*, *ante*, p. 123; *Paris Adult Theatre I* v. *Slaton*, *ante*, p. 49. This case is remanded to the District Court for reconsideration of the sufficiency of the indictment in light of *Miller* v. *California*, *ante*, p. 15; *United States* v. *12 200-ft. Reels of Film*, *supra*, and this opinion. Pp. 141–145.

338 F. Supp. 308, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 145. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 147.

Solicitor General Griswold reargued the cause for the United States. With him on the brief were *Acting Assistant Attorney General Petersen*, *Jerome M. Feit*, and *Roger A. Pauley*. *R. Kent Greenawalt* argued the cause for the United States on the original argument.

James M. Shellow reargued the cause for appellee. With him on the brief was *James A. Walrath*.*

**Melvin L. Wulf* and *Joel M. Gora* filed a brief for the American Civil Liberties Union as *amicus curiae* urging affirmance.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

Appellee Orito was charged in the United States District Court for the Eastern District of Wisconsin with a violation of 18 U. S. C. § 1462 [1] in that he did "knowingly transport and carry in interstate commerce from San Francisco . . . to Milwaukee . . . by means of a common carrier, that is, Trans-World Airlines and North Central Airlines, copies of [specified] obscene, lewd, lascivious, and filthy materials . . . ." The materials specified included some 83 reels of film, with as many as eight to 10 copies of some of the films. Appellee moved to dismiss the indictment on the ground that the statute violated his First and Ninth Amendment rights.[2] The District Court granted his motion, holding that the statute was unconstitutionally overbroad since it failed to distinguish between "public" and "non-public" transportation of obscene material. The District Court interpreted this Court's decisions in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965); *Redrup* v. *New York*, 386 U. S. 767 (1967); and *Stanley* v. *Georgia*, 394 U. S. 557 (1969), to establish

[1] Title 18 U. S. C. § 1462 provides in pertinent part:

"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; . . .

. . . . . .

"Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter."

[2] Appellee also moved to dismiss the indictment on the grounds that 18 U. S. C. § 1462 does not require proof of *scienter*. That issue was not reached by the District Court and is not before us now.

the proposition that "non-public transportation" of obscene material was constitutionally protected.[3]

Although the District Court held the statute void on its face for overbreadth, it is not clear whether the statute was held to be overbroad because it covered transportation intended solely for the private use of the transporter, or because, regardless of the intended use of the material, the statute extended to "private carriage" or "nonpublic" transportation which in itself involved no risk of exposure to children or unwilling adults. The United States brought this direct appeal under former 18 U. S. C. § 3731 (1964 ed.) now amended, Pub. L. 91–644, § 14 (a), 84 Stat. 1890. See *United States* v. *Spector*, 343 U. S. 169, 171 (1952).

The District Court erred in striking down 18 U. S. C. § 1462 and dismissing appellee's indictment on these "privacy" grounds. The essence of appellee's contentions is that *Stanley* has firmly established the right to possess obscene material in the privacy of the home and that this creates a correlative right to receive it, transport it, or distribute it. We have rejected that reasoning. This case was decided by the District Court before our decisions in *United States* v. *Thirty-seven Photographs*, 402 U. S. 363 (1971), and *United States* v. *Reidel*, 402 U. S. 351 (1971). Those holdings negate the idea that some zone of constitutionally protected privacy

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[3] The District Court stated:

"By analogy, it follows that with the right to read obscene matters comes the right to transport or to receive such material when done in a fashion that does not pander it or impose it upon unwilling adults or upon minors.

. . . . . .

"I find no meaningful distinction between the private possession which was held to be protected in *Stanley* and the non-public transportation which the statute at bar proscribes." 338 F. Supp. 308, 310 (1970).

follows such material when it is moved outside the home area protected by *Stanley*.[4] *United States* v. *Thirty-seven Photographs, supra,* at 376 (opinion of WHITE, J.). *United States* v. *Reidel, supra,* at 354–356. See *United States* v. *Zacher,* 332 F. Supp. 883, 885–886 (ED Wis. 1971). But cf. *United States* v. *Thirty-seven Photographs, supra,* at 379 (STEWART, J., concurring).

The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education. See *Eisenstadt* v. *Baird,* 405 U. S. 438, 453–454 (1972); *Loving* v. *Virginia,* 388 U. S. 1, 12 (1967); *Griswold* v. *Connecticut, supra,* at 486; *Prince* v. *Massachusetts,* 321 U. S. 158, 166 (1944); *Skinner* v. *Oklahoma,* 316 U. S. 535, 541 (1942); *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535 (1925). But viewing obscene films in a commercial theater open to the adult public, see *Paris Adult Theatre I* v. *Slaton, ante,* at 65–67, or transporting such films in common carriers in interstate commerce, has no claim to such special consideration.[5] It is hardly necessary to catalog the myriad activities that may be lawfully con-

[4] "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs *in the privacy of his own home.*" *Stanley* v. *Georgia,* 394 U. S. 557, 565 (1969). (Emphasis added.)

[5] The Solicitor General indicates that the tariffs of most, if not all, common carriers include a right of inspection. Resorting to common carriers, like entering a place of public accommodation, does not involve the privacies associated with the home. See *United States* v. *Thirty-seven Photographs,* 402 U. S. 363, 376 (1971) (opinion of WHITE, J.); *United States* v. *Reidel,* 402 U. S. 351, 359–360 (1971) (Harlan, J., concurring); *Poe* v. *Ullman,* 367 U. S. 497, 551–552 (1961) (Harlan, J., dissenting); *Miller* v. *United States,* 431 F. 2d 655, 657 (CA9 1970); *United States* v. *Melvin,* 419 F. 2d 136, 139 (CA4 1969).

ducted within the privacy and confines of the home, but may be prohibited in public. The Court has consistently rejected constitutional protection for obscene material outside the home. See *United States* v. *12 200-ft. Reels of Film, ante,* at 126–129; *Miller* v. *California, ante,* at 23; *United States* v. *Reidel, supra,* at 354–356 (opinion of WHITE, J.); *id.,* at 357–360 (Harlan, J., concurring); *Roth* v. *United States,* 354 U. S. 476, 484–485 (1957).

Given (a) that obscene material is not protected under the First Amendment, *Miller* v. *California, supra; Roth* v. *United States, supra,* (b) that the Government has a legitimate interest in protecting the public commercial environment by preventing such material from entering the stream of commerce, see *Paris Adult Theatre I, ante,* at 57–64, and (c) that no constitutionally protected privacy is involved, *United States* v. *Thirty-seven Photographs, supra,* at 376 (opinion of WHITE, J.), we cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because the material is intended for the private use of the transporter. That the transporter has an abstract proprietary power to shield the obscene material from all others and to guard the material with the same privacy as in the home is not controlling. Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area, regardless of a transporter's professed intent. Congress could reasonably determine such regulation to be necessary to effect permissible federal control of interstate commerce in obscene material, based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure

could cause. See *Paris Adult Theatre I* v. *Slaton, ante,* at 57–63. See also *United States* v. *Alpers,* 338 U. S. 680, 681–685 (1950); *Brooks* v. *United States,* 267 U. S. 432, 436–437 (1925); *Weber* v. *Freed,* 239 U. S. 325, 329–330 (1915). "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. *McCray* v. *United States,* 195 U. S. 27; *Sonzinsky* v. *United States,* 300 U. S. 506, 513 and cases cited." *United States* v. *Darby,* 312 U. S. 100, 115 (1941). "It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promoting or spreading evil, whether of a physical, moral or economic nature." *North American Co.* v. *SEC,* 327 U. S. 686, 705 (1946).[6]

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[6] "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce. . . . In the *Lottery Case,* 188 U. S. 321, it was held that Congress might pass a law punishing the transmission of lottery tickets from one State to another, in order to prevent the carriage of those tickets to be sold in other States and thus demoralize, through a spread of the gambling habit, individuals who were likely to purchase. . . . In *Hoke* v. *United States,* 227 U. S. 308 and *Caminetti* v. *United States,* 242 U. S. 470, the so-called White Slave Traffic Act, which was construed to punish any person engaged in enticing a woman from one State to another for immoral ends, whether for commercial purposes or otherwise, was valid because it was intended to prevent the use of interstate commerce to facilitate prostitution or concubinage, and other forms of immorality. . . . In *Weber* v. *Freed,* 239 U. S. 325, it was held that Congress had power to prohibit the importation of pictorial representations of prize fights designed for

As this case came to us on the District Court's summary dismissal of the indictment, no determination of the obscenity of the material involved has been made. Today, for the first time since *Roth* v. *United States, supra,* we have arrived at standards accepted by a majority of this Court for distinguishing obscene material, unprotected by the First Amendment, from protected free speech. See *Miller* v. *California, ante,* at 23–25; *United States* v. *12 200-ft. Reels of Film, ante,* at 130 n. 7. The decision of the District Court is therefore vacated and the case is remanded for reconsideration of the sufficiency of the indictment in light of *Miller* v. *California, supra; United States* v. *12 200-ft. Reels, supra;* and this opinion.

Vacated and remanded.

MR. JUSTICE DOUGLAS, dissenting.

We held in *Stanley* v. *Georgia,* 394 U. S. 557, that an individual reading or examining "obscene" materials in the privacy of his home is protected against state prosecution by reason of the First Amendment made applicable to the States by reason of the Fourteenth. We said:

> "These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the

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public exhibition, because of the demoralizing effect of such exhibitions in the State of destination." *Brooks* v. *United States,* 267 U. S. 432, 436–437 (1925).

> films in the present case are obscene. But we think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." *Id.*, at 565.

By that reasoning a person who reads an "obscene" book on an airline or bus or train is protected. So is he who carries an "obscene" book in his pocket during a journey for his intended personal enjoyment. So is he who carries the book in his baggage or has a trucking company move his household effects to a new residence. Yet 18 U. S. C. § 1462* makes such interstate carriage unlawful. Appellee therefore moved to dismiss the indictment on the ground that § 1462 is so broad as to cover "obscene" material designed for personal use.

The District Court granted the motion, holding that § 1462 was overbroad and in violation of the First Amendment.

The conclusion is too obvious for argument, unless we are to overrule *Stanley*. I would abide by *Stanley* and affirm the judgment dismissing the indictment.

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*"Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common carrier, for carriage in interstate or foreign commerce—

"(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character."

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

We noted probable jurisdiction to consider the constitutionality of 18 U. S. C. § 1462, which makes it a federal offense to "[bring] into the United States, or any place subject to the jurisdiction thereof, or knowingly [use] any express company or other common carrier, for carriage in interstate or foreign commerce—(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character." Appellee was charged in a one-count indictment with having knowingly transported in interstate commerce over 80 reels of allegedly obscene motion picture film. Relying primarily on our decision in *Stanley* v. *Georgia,* 394 U. S. 557 (1969), the United States District Court for the Eastern District of Wisconsin dismissed the indictment, holding the statute unconstitutional on its face:

> "To prevent the pandering of obscene materials or its exposure to children or to unwilling adults, the government has a substantial and valid interest to bar the non-private transportation of such materials. However, the statute which is now before the court does not so delimit the government's prerogatives; on its face, it forbids the transportation of obscene materials. Thus, it applies to non-public transportation in the absence of a special governmental interest. The statute is thus overbroad, in violation of the first and ninth amendments, and is therefore unconstitutional." 338 F. Supp. 308, 311 (ED Wis. 1970).

Under the view expressed in my dissent today in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73, it is clear that the statute before us cannot stand. Whatever the extent of

the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, the statute before us is clearly overbroad and unconstitutional on its face. See my dissent in *Miller* v. *California, ante,* p. 47. I would therefore affirm the judgment of the District Court.

COLGROVE *v.* BATTIN, U. S. DISTRICT JUDGE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71–1442. Argued January 17, 1973—Decided June 21, 1973

Local federal court rule providing that a jury for the trial of civil cases shall consist of six persons comports with the Seventh Amendment requirement and the coextensive statutory requirement of 28 U. S. C. § 2072 that the right of trial by jury be preserved in suits at common law, and is not inconsistent with Fed. Rule Civ. Proc. 48 that deals only with parties' stipulations regarding jury size. Pp. 151–164.

456 F. 2d 1379, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which POWELL, J., joined, *post*, p. 165. MARSHALL, J., filed a dissenting opinion, in which STEWART, J., joined, *post*, p. 166. POWELL, J., filed a dissenting opinion, *post*, p. 188.

Lloyd J. Skedd argued the cause and filed a brief for petitioner.

Cale Crowley argued the cause and filed a brief for respondent.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Local Rule 13(d)(1) of the Revised Rules of Procedure of the United States District Court for the District of

*Briefs of *amici curiae* were filed by *William A. Wick, Alston Jennings,* and *John C. Elam* for the International Association of Insurance Counsel; by *Joseph W. Cotchett, David Daar, Leonard Sacks, Siegfried Hesse, Edward I. Pollock, Theodore A. Horn,* and *Marvin E. Lewis* for the California Trial Lawyers Assn.; by *Leonard Boudin* and *Alan Scheflin* for the National Emergency Civil Liberties Committee; and by the Nooter Corp.

Montana provides that a jury for the trial of civil cases shall consist of six persons.[1] When respondent District Court Judge set this diversity case for trial before a jury of six in compliance with the Rule, petitioner sought mandamus from the Court of Appeals for the Ninth Circuit to direct respondent to impanel a 12-member jury. Petitioner contended that the local Rule (1) violated the Seventh Amendment;[2] (2) violated the statutory provision, 28 U. S. C. § 2072, that rules "shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment . . ."; [3]

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[1] Rule 13 (d) (1) provides:

"A jury for the trial of civil cases shall consist of six persons plus such alternate jurors as may be impaneled."

Similar local rules have been adopted by 54 other federal district courts, at least as to some civil cases. See the appendix to Fisher, The Seventh Amendment and the Common Law: No Magic in Numbers, 56 F. R. D. 507, 535–542 (1973) (the District Court of Delaware has since adopted a rule effective January 1, 1973). In addition, two bills were introduced in the 92d Congress to reduce to six the number of jurors in all federal civil cases. H. R. 7800, 92d Cong., 1st Sess. (1971); H. R. 13496, 92d Cong., 2d Sess. (1972). H. R. 7800, insofar as it related to civil juries, has received the approval of the Committee on the Operation of the Jury System of the Judicial Conference of the United States. 1971 Annual Report of the Director of the Administrative Office of the United States Courts 41. That Conference itself at its March 1971 meeting endorsed "in principle" a reduction in the size of civil juries. *Ibid.*

[2] The Seventh Amendment provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

State court decisions have usually turned on the interpretation of state constitutional provisions. See Ann., 47 A. L. R. 3d 895 (1973).

[3] Title 28 U. S. C. § 2072 provides:

"The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the

and (3) was rendered invalid by Fed. Rule Civ. Proc. 83 because "inconsistent with" Fed. Rule Civ. Proc. 48 that provides for juries of less than 12 when stipulated by the parties.[4] The Court of Appeals found no merit in these contentions, sustained the validity of local Rule 13 (d) (1), and denied the writ, 456 F. 2d 1379 (1972). We granted certiorari, 409 U. S. 841 (1972). We affirm.

I

In *Williams* v. *Florida,* 399 U. S. 78 (1970), the Court sustained the constitutionality of a Florida statute providing for six-member juries in certain criminal cases. The constitutional challenge rejected in that case relied on the guarantees of jury trial secured the accused by Art. III, § 2, cl. 3, of the Constitution and by the Sixth Amendment.[5] We expressly reserved, however, the ques-

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practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . .

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

[4] Fed. Rule Civ. Proc. 48 provides:

"The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury."

Fed. Rule Civ. Proc. 83 provides:

"Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

[5] Art. III, § 2, cl. 3, provides:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to

tion whether "additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation" with respect to jury trial in civil cases. *Id.*, at 92 n. 30. We conclude that they do not.

The pertinent words of the Seventh Amendment are: "In Suits at common law . . . the right of trial by jury shall be preserved . . . ."[6] On its face, this language is not directed to jury characteristics, such as size, but rather defines the kind of cases for which jury trial is preserved, namely, "suits at common law." And while it is true that "[w]e have almost no direct evidence concerning the intention of the framers of the seventh amendment itself,"[7] the historical setting in which the Seventh Amendment was adopted highlighted a controversy that was generated, not by concern for preservation of jury characteristics at common law, but by fear that the civil jury itself would be abolished unless protected in express words. Almost a century and a half ago, this Court recognized that "[o]ne of the strongest

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a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[6] The reference to "common law" contained in the second clause of the Seventh Amendment is irrelevant to our present inquiry because it deals exclusively with the prohibition contained in that clause against the indirect impairment of the right of trial by jury through judicial re-examination of factfindings of a jury other than as permitted in 1791. *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 657 (1935); *Parsons* v. *Bedford*, 3 Pet. 433, 447–448 (1830); 5 J. Moore, Federal Practice ¶ 38.08 [5], pp. 86–90 (2d ed. 1971).

[7] Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289, 291 (1966).

objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." *Parsons* v. *Bedford,* 3 Pet. 433, 445 (1830). But the omission of a protective clause from the Constitution was not because an effort was not made to include one. On the contrary, a proposal was made to include a provision in the Constitution to guarantee the right of trial by jury in civil cases but the proposal failed because the States varied widely as to the cases in which civil jury trial was provided, and the proponents of a civil jury guarantee found too difficult the task of fashioning words appropriate to cover the different state practices.[8] The

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[8] See 2 M. Farrand, Records of the Federal Convention 587 (1911). See also Henderson, *supra,* n. 7, at 292–294.

The question of a provision for the protection of the right to trial by jury in civil cases apparently was not presented at the Constitutional Convention until a proposed final draft of the Constitution was reported out of the Committee on Style and Arrangement. At that point, Mr. Williamson of North Carolina "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." 2 Farrand, *supra,* at 587. This provoked the following discussion:

"Mr. Gorham. It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter.

"Mr. Gerry urged the necessity of Juries to guard [against] corrupt Judges. He proposed that the Committee last appointed should be directed to provide a clause for securing the trial by Juries.

"Col. Mason perceived the difficulty mentioned by Mr. Gorham. The jury cases cannot be specified. A general principle laid down on this and some other points would be sufficient. He wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose . . . ." *Ibid.*

Three days later, a proposal was made by Mr. Gerry and Mr. Pinckney to add the following language to the Art. III guarantee of trial by jury in criminal cases: "And a trial by jury shall be pre-

strong pressures for a civil jury provision in the Bill of Rights encountered the same difficulty. Thus, it was agreed that, with no federal practice to draw on and

served as usual in civil cases." This proposal prompted the following reaction:

"Mr. Gorham. The constitution of Juries is different in different States and the trial itself is *usual* in different cases in different States.

"Mr. King urged the same objections.

"Genl. Pinckney also. He thought such a clause in the Constitution would be pregnant with embarrassments.

"The motion was disagreed to nem. con." *Id.*, at 628.

James Wilson of Pennsylvania defended the omission at the Pennsylvania Convention convened to ratify the Constitution:

"The cases open to a jury, differed in the different states; it was therefore impracticable, on that ground, to have made a general rule. The want of uniformity would have rendered any reference to the practice of the states idle and useless: and it could not, with any propriety, be said, that 'the trial by jury shall be as heretofore:' since there has never existed any foederal system of jurisprudence, to which the declaration could relate. Besides, it is not in all cases that the trial by jury is adopted in civil questions: for causes depending in courts of admiralty, such as relate to maritime captures, and such as are agitated in the courts of equity, do not require the intervention of that tribunal. How, then, was the line of discrimination to be drawn? The convention found the task too difficult for them; and they left the business as it stands—in the fullest confidence, that no danger would possibly ensue, since the proceedings of the supreme court are to be regulated by the congress, which is a faithful representation of the people: and the oppression of government is effectually barred, by declaring that in all criminal cases, the trial by jury shall be preserved." 3 M. Farrand, Records of the Federal Convention 101 (1911).

A proponent of a guarantee responded:

"The second and most important objection to the federal plan, which Mr. Wilson pretends to be made in a disingenuous form, is the entire abolition of the trial by jury in civil cases. It seems to me that Mr. Wilson's pretended answer is much more disingenuous than the objection itself . . . . He says, 'that the cases open to trial by jury differing in the different States, it was therefore impracticable to have made a general rule.' This answer is extremely futile, because a reference might easily have been made to the com-

since state practices varied so widely, any compromising language would necessarily have to be general. As a result, although the Seventh Amendment achieved the primary goal of jury trial adherents to incorporate an explicit constitutional protection of the right of trial by jury in civil cases, the right was limited in general words to "suits at common law."[9] We can only conclude, therefore, that by referring to the "common law," the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various inci-

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mon law of England, which obtains through every State, and cases in the maritime and civil law courts would, of course, be excepted. . . ." Quoted in Henderson, *supra*, n. 7, at 296–297. See also 1 J. Elliot, The Debates in the Several State Conventions, on the Adoption of the Federal Constitution (2d ed. 1836).

[9] That the words "common law" were used merely to establish a general rule of trial by jury in civil cases was the view of Mr. Justice Story in the discussion in his Commentaries of the Seventh Amendment and the Judiciary Act of 1789:

"The phrase, 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution had declared, in the third article, 'that the judicial power shall extend to all cases in *law and equity* arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority,' &c., and 'to all cases of *admiralty and maritime jurisdiction*.' It is well known, that in civil causes, in courts of equity and admiralty, juries do not intervene; and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find, that the amendment requires, that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is, that the distinction was present to the minds of the framers of the amendment. By *common law* they meant, what the constitution denominated in the third article 'law' . . . . And congress seem to have acted with reference to this exposition in the judiciary act of 1789, ch. 20, (which was contemporaneous with the proposal of this amendment;) . . . ." 3 J. Story, Commentaries on the Constitution of the United States 645–646 (1833).

dents of trial by jury.[10] In short, what was said in *Williams* with respect to the criminal jury is equally applicable here: constitutional history reveals no intention on the part of the Framers "to equate the constitutional and common-law characteristics of the jury." 399 U. S., at 99.

Consistently with the historical objective of the Seventh Amendment, our decisions have defined the jury right preserved in cases covered by the Amendment, as "the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure . . . ." *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 657 (1935).[11] The Amendment, therefore, does not "bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791," *Galloway* v. *United States*, 319

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[10] Constitutional history does not reveal a single instance where concern was expressed for preservation of the traditional number 12. Indeed, James Wilson of Pennsylvania, a member of the Constitutional Convention and later a Justice of this Court, stated: "When I speak of juries, I feel no peculiar predilection for the number twelve . . . ." 2 The Works of James Wilson 503 (R. McCloskey ed. 1967).

[11] See also Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669, 671 (1918):

"Although the incidents of trial by jury which existed at the time of the adoption of the constitutional guaranty are not thereby abolished, yet those incidents are not necessarily made unalterable. Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature. The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential, a question which is necessarily, in the last analysis, one of degree. The question, it is submitted, should be approached in a spirit of open-mindedness, of readiness to accept any changes which do not impair the fundamentals of trial by jury. It is a question of substance, not of form."

U. S. 372, 390 (1943); see also *Ex parte Peterson,* 253 U. S. 300, 309 (1920); *Walker* v. *New Mexico & S. P. R. Co.,* 165 U. S. 593, 596 (1897), and "[n]ew devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. . . ." *Ex parte Peterson, supra,* at 309–310; *Funk* v. *United States,* 290 U. S. 371, 382 (1933).

Our inquiry turns, then, to whether a jury of 12 is of the substance of the common-law right of trial by jury. Keeping in mind the purpose of the jury trial in criminal cases to prevent government oppression, *Williams,* 399 U. S., at 100, and, in criminal and civil cases, to assure a fair and equitable resolution of factual issues, *Gasoline Products Co.* v. *Champlin Co.,* 283 U. S. 494, 498 (1931), the question comes down to whether jury performance is a function of jury size. In *Williams,* we rejected the notion that "the reliability of the jury as a factfinder . . . [is] a function of its size," 399 U. S., at 100–101, and nothing has been suggested to lead us to alter that conclusion. Accordingly, we think it cannot be said that 12 members is a substantive aspect of the right of trial by jury.

It is true, of course, that several earlier decisions of this Court have made the statement that "trial by jury" means "a trial by a jury of twelve . . . ." *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 13 (1899); see also *American Publishing Co.* v. *Fisher,* 166 U. S. 464 (1897); *Maxwell* v. *Dow,* 176 U. S. 581, 586 (1900). But in each case, the reference to "a jury of twelve" was clearly dictum and not a decision upon a question presented or litigated. Thus, in *Capital Traction Co.* v. *Hof, supra,* the case most often cited, the question presented was whether a civil action brought before a justice of the peace of the District of Columbia was triable by jury,

and that question turned on whether the justice of the peace was a judge empowered to instruct them on the law and advise them on the facts. Insofar as the *Hof* statement implied that the Seventh Amendment required a jury of 12, it was at best an assumption. And even if that assumption had support in common-law doctrine,[12] our canvass of the relevant constitutional history, like the history canvassed in *Williams* concerning the criminal jury, "casts considerable doubt on the easy assumption in our past decisions that if a given feature existed in a jury at common law . . . then it was necessarily preserved in the Constitution." 399 U. S., at 92–93. We cannot, therefore, accord the unsupported dicta of these earlier decisions the authority of decided precedents.[13]

There remains, however, the question whether a jury of six satisfies the Seventh Amendment guarantee of "trial by jury." We had no difficulty reaching the conclusion in *Williams* that a jury of six would guarantee an accused the trial by jury secured by Art. III and the Sixth Amendment. Significantly, our determination that there was "no discernible difference between the results reached by the two different-sized juries," 399 U. S., at 101, drew largely upon the results of studies of the operations of juries of six in civil cases.[14] Since then,

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[12] Although *Williams* proceeded on the premise that the common-law jury was composed of 12 members, juries of less than 12 were common in this country throughout colonial times. See the cases and statutes cited in Fisher, *supra*, n. 1, at 529–532.

[13] See Devitt, The Six Man Jury in the Federal Court, 53 F. R. D. 273, 274 (1971); Augelli, Six-Member Juries in Civil Actions in the Federal Judicial System, 3 Seton Hall L. Rev. 281, 285 (1972); Croake, Memorandum on the Advisability and Constitutionality of Six Man Juries and 5/6 Verdicts in Civil Cases, 44 N. Y. State B. J. 385 (1972). See also *Leger* v. *Westinghouse Electric Corp.*, 54 F. R. D. 574 (WD La. 1972); contra, *Winsby* v. *John Oster Mfg. Co.*, 336 F. Supp. 663 (WD Pa. 1972).

[14] *Williams* v. *Florida*, 399 U. S. 78, 101 n. 48 (1970).

much has been written about the six-member jury, but nothing that persuades us to depart from the conclusion reached in *Williams*.[15] Thus, while we express no view

[15] Arguments, pro and con, on the effectiveness of a jury of six compared to a jury of 12 will be found in Devitt, *supra*, n. 13; Augelli, *supra*, n. 13; Croake, *supra*, n. 13; Fisher, *supra*, n. 1; Bogue & Fritz, The Six-Man Jury, 17 S. D. L. Rev. 285 (1972); Moss, The Twelve Member Jury in Massachusetts—Can it be Reduced?, 56 Mass. L. Q. 65 (1971); Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710 (1971); Zeisel, The Waning of the American Jury, 58 A. B. A. J. 367 (1972); Gibbons, The New Minijuries: Panacea or Pandora's Box?, 58 A. B. A. J. 594 (1972); Kaufman, The Harbingers of Jury Reform, 58 A. B. A. J. 695 (1972); Whalen, Remarks on Resolution of 7th Amendment Jury Trial Requirement, 54 F. R. D. 148 (1972); Note, Right to Twelve-Man Jury, 84 Harv. L. Rev. 165 (1970); Note, Reducing the Size of Juries, 5 U. Mich. J. L. Reform 87 (1971); Note, The Effect of Jury Size on the Probability of Conviction: An Evaluation of *Williams* v. *Florida*, 22 Case W. Res. L. Rev. 529 (1971); Comment, Defendant's Right to a Jury Trial—Is Six Enough?, 59 Ky. L. J. 997 (1971).

Professor Zeisel has suggested that the six-member jury is more limited than the 12-member jury in representing the full spectrum of the community, and this in turn may result in differences between the verdicts reached by the two panels. Zeisel, *supra*, 38 U. Chi. L. Rev., at 716–719.

On the other hand, one study suggests that the decrease in the size of the jury from 12 to six is conducive to a more open discussion among the jurors, thereby improving the quality of the deliberative process. Note, *supra*, 5 U. Mich. J. L. Reform, at 99–106. See also C. Joiner, Civil Justice and the Jury 31, 83 (1962) (concluding prior to *Williams* that the deliberative process should be the same in either six- or 12-member juries).

In addition, four very recent studies have provided convincing empirical evidence of the correctness of the *Williams* conclusion that "there is no discernible difference between the results reached by the two different-sized juries." Note, Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results, 6 U. Mich. J. L. Reform 671 (1973); Institute of Judicial Administration, A Comparison of Six- and Twelve-Member Civil Juries in New Jersey Superior and County Courts (1972); Note, An Empirical Study of

as to whether any number less than six would suffice,[16] we conclude that a jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases.[17]

Six- and Twelve-Member Jury Decision-Making Processes, 6 U. Mich. J. L. Reform 712 (1973); Bermant & Coppock, Outcomes of Six- and Twelve-Member Jury Trials: An Analysis of 128 Civil Cases in the State of Washington, 48 Wash. L. Rev. 593 (1973).

[16] What is required for a "jury" is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community. *Williams* v. *Florida*, 399 U. S., at 100. It is undoubtedly true that at some point the number becomes too small to accomplish these goals, but, on the basis of presently available data, that cannot be concluded as to the number six. See Tamm, A Proposal for Five-Member Civil Juries in the Federal Courts, 50 A. B. A. J. 162 (1964); Tamm, The Five-Man Civil Jury: A Proposed Constitutional Amendment, 51 Geo. L. J. 120 (1962).

[17] My Brother MARSHALL argues in dissent that the various incidents of trial by jury as they existed at common law are immutably saved by the Seventh Amendment's use of the word "preserved." But obviously the Amendment commands only that the *right* of trial by jury be "preserved." Since a jury of 12 is, as has been shown, not of the substance of the common-law right of trial by jury and since there is "no discernible difference between the results reached by the two different-sized juries," *Williams* v. *Florida*, *supra*, at 101, the use of a six-member civil jury does not impair the *right* "preserved" by the Seventh Amendment. Indeed, as my Brother MARSHALL himself recognizes, *post*, at 179, several devices designed to improve the jury system and unknown to the common law have been approved by this Court over the years. See also Henderson, *supra*, n. 7; Scott, *supra*, n. 11. In each case, the determining factor was that the new device did not impair the *right* preserved by the Seventh Amendment. As Mr. Justice Brandeis aptly stated in response to the argument that a federal court was prevented by the Seventh Amendment from utilizing a special master because it would infringe upon the right of trial by jury:

"The command of the Seventh Amendment that 'the right of trial by jury shall be preserved' . . . does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes

II

The statute, 28 U. S. C. § 2072, authorizes this Court to promulgate the Federal Rules of Civil Procedure but provides that "[s]uch rules . . . shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." [18] Petitioner argues that in securing trial by jury "as at common law" and also "as declared by the Seventh Amendment," Congress meant to provide a jury having the characteristics of the common-law jury even if the Seventh Amendment did not require a jury with those characteristics. As the Court of Appeals observed, "[t]his would indeed be a sweeping limitation." 456 F. 2d, at 1380. Petitioner would impute to Congress an intention to saddle archaic and presently unworkable common-law procedures upon the federal courts [19] and thereby to nullify innovative changes approved by this Court over the years that have now become commonplace and, for

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in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with." *Ex parte Peterson*, 253 U. S. 300, 309–310 (1920).

[18] Section 2072 is in terms applicable only to the general Federal Rules of Civil Procedure prescribed by this Court. However, 28 U. S. C. § 2071, which authorizes federal district courts to prescribe local rules of practice and procedure, see Part III, *infra*, requires such rules to be "consistent with Acts of Congress" as well as the general Federal Rules. Thus, if § 2072 prohibits a jury of less than 12, the local rule in question would conflict with an Act of Congress and would therefore be invalid. See 3A W. Barron & A. Holtzoff, Federal Practice and Procedure § 1171, p. 179 (C. Wright ed. 1958).

[19] See Henderson, *supra*, n. 7; Scott, *supra*, n. 11.

all practical purposes, "essential to the preservation of the right" of trial by jury in our modern society. *Ex parte Peterson,* 253 U. S., at 310; *Galloway* v. *United States,* 319 U. S., at 390–391. For to say that Congress chose this means to render our system of civil jury trial immutable as of 1791, or some other date, is to say the Congress meant to deny the judiciary the "flexibility and capacity for growth and adaptation [which] is the peculiar boast and excellence of the common law." *Hurtado* v. *California,* 110 U. S. 516, 530 (1884); *Funk* v. *United States,* 290 U. S., at 382.

But petitioner's extravagant contention has not the slightest support in the legislative history of the provision. Section 2072 is derived from the Enabling Act of 1934, 48 Stat. 1064.[20] Section 2 of that Act gave this Court the "power to unite the general rules prescribed . . . for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both." H. R. Rep. No. 1829, 73d Cong., 2d Sess., 1 (1934). As emphasized by the Court of Appeals, the language of § 2 preserving the right of trial by jury was included "to assure that with such union [of law and equity] the right of trial by jury would be neither expanded nor contracted." 456 F. 2d, at 1381, citing 5 J. Moore, Federal Practice ¶ 38.06, p. 44 (2d ed. 1971). See also *Cooley* v. *Strickland Transportation Co.,* 459 F. 2d 779, 785 (CA5 1972). In other words, Congress used the language in question for the sole purpose of creating a statutory right coextensive with that under the Seventh

[20] See 5 J. Moore, Federal Practice ¶ 38.06 (2d ed. 1971). The pertinent provisions of the Enabling Act of 1934 were carried forward by the codifying act of 1948, 62 Stat. 961, and later became § 2072 of the Judicial Code, 28 U. S. C. § 1 *et seq.* Section 2072 has been amended several times since 1947, but none of the amendments is relevant to our present discussion.

Amendment itself.[21] If Congress had meant to prescribe a jury number or to legislate common-law features generally, "it knew how to use express language to that effect." *Williams* v. *Florida,* 399 U. S., at 97.

III

Petitioner's argument that local Rule 13 (d)(1) [22] is inconsistent with Fed. Rule Civ. Proc. 48 rests on the proposition that Rule 48 implies a direction to impanel a jury of 12 in the absence of a stipulation of the parties for a lesser number. Rule 48 was drafted at the time the statement in *Capital Traction Co.* v. *Hof, supra,* that trial by jury means a "jury of twelve," was generally accepted. Plainly the assumption of the draftsmen that such was the case cannot be transmuted into an implied direction to impanel juries of 12 without regard to whether a jury of 12 was required by the Seventh Amendment. Our conclusion that the *Hof* statement lacks precedential weight leaves Rule 48 without the support even of the draftsmen's assumption and thus there is nothing in the Rule with which the local Rule is inconsistent.[23]

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[21] Cf. *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 10 (1941): "The second [proviso of the Enabling Act of 1934] is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved."

[22] This Rule was adopted pursuant to Fed. Rule Civ. Proc. 83, which in turn is derived from 28 U. S. C. § 2071:

"The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

[23] An *amicus* argues that the local Rule is invalid under our decision in *Miner* v. *Atlass,* 363 U. S. 641 (1960). That argument is misplaced. *Miner* struck down a local rule authorizing discovery-deposition practice in admiralty cases. A court of admiralty had

See *Cooley* v. *Strickland Transportation Co., supra,* at 783–785; Devitt, The Six Man Jury in the Federal Court, 53 F. R. D. 273, 274 n. 1 (1971).

Similarly, we reject the argument that the local Rule conflicts with Rule 48 because it deprives petitioner of the right to stipulate to a jury of "any number less than twelve." Aside from the fact that there is no indication in the record that petitioner ever sought a jury of less than 12, Rule 48 "deals only with a stipulation *by* '[*t*]*he parties.*' It does not purport to prevent *court rules* which provide for civil juries of reduced size." *Cooley* v. *Strickland Transportation Co., supra,* at 784.

Affirmed.

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no inherent power, independent of statute or rule, to order the taking of depositions for the purpose of discovery. In 1939, this Court omitted this "basic procedural innovation" from among the Civil Rules adopted as part of the Admiralty Rules. *Miner* held that this omission "must be taken as an advertent declination of the opportunity to institute the discovery-deposition procedure of Civil Rule 26 (a) throughout courts of admiralty," *id.,* at 648, and therefore, for this and additional reasons stated in the opinion, that the local rule "is not consistent with the present General Admiralty Rules . . . ." *Id.,* at 647. In contrast, we hold in this case that Local Rule 13 (d)(1) is not inconsistent with Fed. Rule Civ. Proc. 48.

Amicus also suggests that *Miner* should be read to hold that all "basic procedural innovations" are beyond local rulemaking power and are exclusively matters for general rulemaking. We need not consider the suggestion because, in any event, we conclude that the requirement of a six-member jury is not a "basic procedural innovation." The "basic procedural innovations" to which *Miner* referred are those aspects of the litigatory process which bear upon the ultimate outcome of the litigation and thus, "though concededly 'procedural,' may be of as great importance to litigants as many a 'substantive' doctrine . . . ." 363 U. S., at 650. Since there has been shown to be "no discernible difference between the results reached by the two different-sized juries," *Williams* v. *Florida, supra,* at 101 (see also n. 15, *supra*), a reduction in the size of the civil jury from 12 to six plainly does not bear on the ultimate outcome of the litigation.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE POWELL concurs, dissenting.

Rule 13(d)(1) of the Revised Rules of Procedure of the United States District Court for the District of Montana provides:

> "A jury for the trial of civil cases shall consist of six persons . . . ."

Federal Rule Civ. Proc. 48—which came into being as a result of a recommendation of this Court to Congress which Congress did not reject*—rests on a federal statute.

The two Rules do not mesh; they collide. Rule 48 says that the only way to obtain a trial with less than 12 jurors or a verdict short of a unanimous one is by stipulation.

As MR. JUSTICE MARSHALL makes clear in his dissent, while the parties under Rule 48 could stipulate for trial by an 11-man jury, under the Montana District Court rule only six jurors could be required. Since all apparently agree that the framers of Rule 48 presumed there would be a jury of 12 in the absence of stipulation, the only authority which could reduce 12 to six would be the authority that created Rule 48. Neither we nor the District Court, nor the Judicial Conference, nor a circuit court council has the authority to make that change.

Whether the change, if made, would be constitutional is a question I therefore do not reach.

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*At the time the Rules of Civil Procedure became effective they had to be submitted to Congress by the Court and Congress had 90 days to reject them. 28 U. S. C. § 2072. At that time § 2072 provided that these Rules "shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." It seems clear beyond peradventure that the draftsmen thought a jury of 12 was required, save as the parties by stipulation waived that right by stipulating to a lesser number.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE STEWART joins, dissenting.

Some 30 years ago, Mr. Justice Black warned his Brethren against the "gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." *Galloway* v. *United States*, 319 U. S. 372, 397 (1943) (dissenting opinion). Today, the erosion process reaches bedrock. In the past, this Court has sanctioned changes in "mere matters of form or procedure" in jury trials, *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, 657 (1935), and in "pleading or practice" before juries, *Walker* v. *New Mexico & S. P. R. Co.*, 165 U. S. 593, 596 (1897). But before today, we had always insisted that "[w]hatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys [a] substantial and essential feature thereof is one abridging the right." *American Publishing Co.* v. *Fisher*, 166 U. S. 464, 468 (1897). See also *Dimick* v. *Schiedt*, 293 U. S. 474 (1935); *Capital Traction Co.* v. *Hof*, 174 U. S. 1 (1899).

Now, however, my Brethren mount a frontal assault on the very nature of the civil jury as that concept has been understood for some seven hundred years. No one need be fooled by reference to the six-man trier of fact utilized in the District Court for the District of Montana as a "jury." This six-man mutation is no more a "jury" than the panel of three judges condemned in *Baldwin* v. *New York*, 399 U. S. 66 (1970), or the 12 laymen instructed by a justice of the peace outlawed in *Capital Traction Co.* v. *Hof*, *supra*. We deal here not with some minor tinkering with the role of the civil jury, but with its wholesale abolition and replacement with a different institution which functions differently, produces different

results,[1] and was wholly unknown to the Framers of the Seventh Amendment.[2]

In my judgment, if such a radical restructuring of the

[1] Although I consider it ultimately irrelevant to the constitutional issue, see *infra*, at 180, it is still of some interest that variations in jury size do seem to produce variations in function and result. It is, of course, intuitively obvious that the smaller the size of the jury, the less likely it is to represent a fair cross-section of community viewpoints. What is less obvious but nonetheless statistically demonstrable is that the difference between a 12-man and six-man jury in this respect is quite dramatic and likely to produce different results. Professor Zeisel, perhaps our leading authority on the civil jury, has demonstrated this fact through use of a model in which he assumes that 90% of a hypothetical community shares the same viewpoint, while 10% has a different viewpoint. Of 100 12-man juries picked randomly from such a community, 72 would have at least one member of the minority group, while of the 100 six-man juries so selected, only 47 would have minority representation. Moreover, the differences in minority representation produce significant differences in result. Professor Zeisel posits a case in which the community is divided into six groups of equal size with respect to the monetary value they place on a given personal injury claim, with one-sixth evaluating the claim at $1,000, another sixth at $2,000, etc. He also assumes that the damages a jury will award lie close to the average assessment of the damages each individual juror would choose. If one accepts these hypotheses, "[i]t is easy to see that the six-member juries show a considerably wider variation of 'verdicts' than the twelve-member juries. For instance, 68.4% of the twelve-member jury evaluations fall between $3,000 and $4,000, while only 51.4% of the six-member jury evaluations fall in this range. Almost 16% of the six-member juries will reach verdicts that will fall into the extreme levels of more than $4,500 or less than $2,500, as against only a little over 4% of the twelve-member juries. The appropriate statistical measure of this variation is the so-called standard deviation. The actual distribution pattern will always depend on the kind of stratification that is relevant in a particular case but, whatever the circumstances, the six-member jury will always have a standard deviation that is greater by about 42%. This is the result of a more general principle

[*Footnote 2 is on p. 168*]

judicial process is deemed wise or necessary, it should be accomplished by constitutional amendment. See, *e. g.*, Tamm, The Five-Man Civil Jury: A Proposed Constitutional Amendment, 51 Geo. L. J. 120 (1962). It appears, however, that the common-law jury is destined to expire, not with a bang, but a whimper. The proponents of the six-man jury have not secured the approval of two-thirds of both Houses of Congress and three-fourths of the state legislatures for their proposal. Indeed, they have not even secured the passage of simple legislation to accomplish their goal. Instead, they have relied upon the interstitial rulemaking power of the majority of the district court judges sitting in a particular district to rewrite the ancient definition of a civil jury.[3] They have done so, moreover, in the teeth of an Act of Congress and a Federal Rule promulgated by this Court

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that is by now well known to readers of such statistics as public opinion polls—namely, that the size of any sample is inversely related to its margin of error." Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. Chi. L. Rev. 710, 717–718 (1971).

[2] See *infra*, at 176–177.

[3] Even in the absence of constitutional difficulties, I view this course as an improper use of the local rulemaking power. In *Miner* v. *Atlass*, we held that the statutory procedures surrounding the rulemaking process were "designed to insure that basic procedural innovations shall be introduced only after mature consideration of informed opinion from all relevant quarters, with all the opportunities for comprehensive and integrated treatment which such consideration affords." 363 U. S. 641, 650 (1960). We therefore declined to construe the local rulemaking power as extending to such innovations. *Ibid.* The Court seeks to escape the force of this precedent with the assertion that "the requirement of a six-member jury is not a 'basic procedural innovation.'" I find this statement startling to say the least. Whatever one's view of the constitutionality of six-man juries, surely it cannot be doubted that this shift in a practice of seven hundred years' standing, likely to affect the outcome of hundreds of cases, see n. 1, *supra*, and *infra*, at 177, constitutes a "basic procedural innovation."

which, in my judgment, were designed to guarantee the 12-man civil jury. By approving this mode of procedure, the Court turns the so-called "clear statement" rule on its head. Instead of requiring a clear statement from Congress when it legislates at the limit of its constitutional powers, see, *e. g., Crowell* v. *Benson,* 285 U. S. 22, 62 (1932), my Brethren approve a departure from settled constitutional understanding despite a clear statement from Congress that it intended no such thing. I must respectfully dissent.

I

At the outset, it should be noted that the constitutional issue in this case is not settled by the prior decisions of this Court upholding nonunanimous and six-man criminal juries. See *Apodaca* v. *Oregon,* 406 U. S. 404 (1972); *Johnson* v. *Louisiana,* 406 U. S. 356 (1972); *Williams* v. *Florida,* 399 U. S. 78 (1970). This is true for at least three reasons.

First, *Apodaca, Johnson,* and *Williams* all involved state trials and, therefore, the requirements of the Fourteenth Amendment rather than the Sixth. This case is, of course, distinguishable in that it deals with a federal trial and, therefore, with Bill of Rights guarantees which are directly applicable, rather than applicable only through the incorporation process.[4] Thus, neither *Apodaca, Johnson,* nor *Williams* squarely presented the Court with the problem of defining the meaning of jury trial in a federal context.[5] Indeed, as

[4] Indeed, the Seventh Amendment is one of the few remaining provisions in the Bill of Rights which has not been held to be applicable to the States. See, *e. g., Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151, 158 (1931); *Wagner Electric Mfg. Co.* v. *Lyndon,* 262 U. S. 226, 232 (1923).

[5] The author of this opinion believes that the Fourteenth Amendment was intended to incorporate fully Sixth Amendment guarantees.

my Brother POWELL's concurring opinion in *Apodaca* and *Johnson* makes plain, there were, as of last Term at least, five Members of this Court who thought that the Sixth Amendment required unanimous jury verdicts in federal cases. See also *Johnson* v. *Louisiana, supra,* at 395 (BRENNAN, J., dissenting). MR. JUSTICE POWELL argued in that opinion that the "process of determining the content of the Sixth Amendment right to jury trial has long been one of careful evaluation of, and strict adherence to the limitations on, that right as it was known in criminal trials at common law." *Id.,* at 370 n. 6 He concluded that the Sixth Amendment required unanimous federal juries because "[a]t the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law." *Id.,* at 371. See also *Williams* v. *Florida, supra,* at 123–125 (opinion of Harlan, J.). It is apparently uncontested that in 1791, common-law civil juries consisted of 12 men. See *infra,* at 177. Thus, to the extent that Sixth Amendment precedent is applicable to Seventh Amendment problems, *Johnson* and *Apodaca* would seem to cut strongly in favor of a 12-man jury requirement in federal court, rather than against such a requirement.

Moreover, even if it is assumed that the holdings in *Apodaca, Williams,* and *Johnson* are readily transferable to a federal context, it still does not follow that the definitions of trial by jury for purposes of the Sixth and Seventh Amendments are necessarily coextensive. The two Amendments use different language and they guarantee different rights. Indeed, as the *Williams* court itself recognized, the approval of six-man juries in crim-

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See *Duncan* v. *Louisiana,* 391 U. S. 145 (1968). Nonetheless, the fact remains that this Court has yet to decide the issues posed by majority verdicts and six-man juries in a purely Sixth Amendment context.

inal cases did not resolve "whether, for example, additional references to the 'common law' that occur in the Seventh Amendment might support a different interpretation." 399 U. S., at 92 n. 30.

The Court today goes to great lengths to show that the reference in the Seventh Amendment to "Suits at common law" speaks only to the type of suit in which a jury is required, not to the type of jury which is required in such suits. However, my brethren totally ignore another textual difference between the Sixth and Seventh Amendments which I consider to be of at least equal significance. Whereas the Sixth Amendment refers only to "an impartial jury," the Seventh Amendment states that "the right of trial by jury shall be *preserved*" (emphasis added). The Seventh Amendment's additional reference to the preservation of the right strongly suggests that the content of that right is to be judged by historical standards.

Certainly, that has been this Court's understanding in the past. In *Dimick* v. *Schiedt*, for example, the Court held that the Seventh Amendment "in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791," 293 U. S., at 487, and the dissent agreed that the purpose of the Seventh Amendment was "to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution." *Id.*, at 490. In *Baltimore & Carolina Line, Inc.* v. *Redman*, the Court held that the "right of trial by jury thus preserved [by the Seventh Amendment] is the right which existed under the English common law when the Amendment was adopted." 295 U. S., at 657. And in *American Publishing Co.* v. *Fisher*, the Court held that what was guaranteed by the Seventh Amendment was "the peculiar and essential features of trial by jury at the common law." 166 U. S., at 468. It should therefore be

clear that, whereas the words of the Sixth Amendment might be read as permitting a functional approach which measures "Sixth Amendment values," the Seventh Amendment requires a historical analysis geared toward determination of what the institution was in 1791 which the Framers intended to "preserve." See also *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364 (1913); *Capital Traction Co.* v. *Hof*, 174 U. S. 1 (1899).

Finally, it is important to note that, whereas the legislative history of the Sixth Amendment tended to support the Court's decision in favor of six-man criminal juries, it is at best ambiguous in the Seventh Amendment context. As the Court pointed out in *Williams*, the Sixth Amendment as originally introduced by James Madison in the House provided "[t]he trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, *with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites.*" 1 Annals of Cong. 435 (1789) (emphasis added). The Amendment passed the House in this form, but when it reached the Senate, that body expressly rejected the "accustomed requisites" language, see Senate Journal, Sept. 9, 1789, 1st Cong., 1st Sess., 77, and the Amendment as ultimately adopted contained no reference to the common-law features of jury trial.

In contrast, the history of the Seventh Amendment contains no express rejection of language which would fix the common-law attributes of the civil jury. Indeed, as the Court itself recognizes, the extant history of the Amendment is exceedingly sketchy. See generally Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289 (1966). Undeterred by the absence of source material, however, my Brethren concoct an elaborate theory designed to demonstrate that the Framers did not intend to fix the nature of the civil jury as it existed at common law. As I read the

majority opinion, the theory is based on the following syllogism:

1. The delegates to the Constitutional Convention considered a clause which would have protected the right to a civil jury, but declined to adopt such a provision because state practice varied widely as to the cases in which a civil jury was provided.

2. When the Seventh Amendment was passed, Congress overrode the arguments of those opposed to a constitutional jury guarantee and decided to provide a federal right of jury trial despite differences between the States as to when jury rights attached.

3. Therefore, in the words of the Court "[w]e can only conclude . . . that . . . the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury."

It hardly requires demonstration that this "logic" rests on the flimsiest of inferences. It simply does not follow that because the Amendment was, at one stage rejected because of disparities among the States in the instances in which the jury right attached, its scope is therefore limited to the surmounting of these disparities. Indeed, the opposite conclusion is equally plausible. One could argue that, whereas there was dispute as to the cases in which the jury-trial right would attach, it was common ground between opponents and proponents of the measure that when it did attach, its incidents would be as at common law. Thus, whatever the meaning of the Amendment as to jury usage, the nature of the jury is, by this argument, at its core and agreed to by all parties.

Moreover, even if the Court's chain of reasoning were correct, the argument would still fall, since it is grounded on a faulty major premise. True, the opponents of a jury guarantee at the Constitutional Convention rested

their argument in part on the varying practice in the States as to the cases in which the right of jury trial attached. But a more detailed examination of the debates than the Court's highly selective quotations permit makes clear that the opponents also rested on the differences in the characteristics of jury trial between the States. Thus, when a jury guarantee was first proposed, Mr. Gorham, one of the principal drafters of the Constitution, argued against the proposal, stating: "It is not possible to discriminate equity cases from those in which juries are proper. The Representatives of the people may be safely trusted in this matter." 2 M. Farrand, Records of the Federal Convention 587 (1911) (hereinafter cited as Farrand). But when the proposal came to a final vote, Mr. Gorham made a somewhat different argument: "The *constitution* of Juries is different in different States." *Id.*, at 628 (emphasis added). Similarly, while at one stage James Wilson defended the absence of a jury requirement on the ground that "[t]he cases open to a jury, differed in different states," 3 Farrand 101, he also made a quite different argument:

> "By the constitution of the different States, it will be found that no particular mode of trial by jury could be discovered that would suit them all. The manner of summoning jurors, their qualifications, of whom they should consist, and the course of their proceedings, are all different, in the different States; and I presume it will be allowed a good general principle, that in carrying into effect the laws of the general government by the judicial department, it will be proper to make the regulations as agreeable to the habits and wishes of the particular States as possible; and it is easily discovered that it would have been impracticable, by any general regulation, to have given satisfaction to all. 3 Farrand 164.

Thus, it is clear that opponents of a jury guarantee were concerned not only with the differing rules for when juries were required among the States, but also with the differing content of the jury right itself.[6] To the extent that anything at all can be inferred from the rejection of these arguments, it follows by the Court's own chain of reasoning that the Framers intended to override state differences as to both the cases in which a jury right would attach and the characteristics of the jury itself.

I should hasten to add that I do not mean to embrace that chain of reasoning. In fact, as indicated above, I view the legislative history as far too fragmentary to support any firm conclusion. But I would have thought that the very uncertainty of the legislative history would support a mode of analysis which looked to the jury as it existed at the time the Seventh Amendment was written in order to determine the intent of the Framers. As Mr. Justice Harlan argued:

> "[I]t is common sense and not merely the blessing of the Framers that explains this Court's frequent reminders that: 'The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history.' *Smith* v. *Alabama*, 124 U. S.

[6] See also George Washington's contemporaneous explanation in a letter to Lafayette for the absence of a jury guarantee ("[I]t was only the difficulty of establishing a mode which should not interfere with the fixed modes of any of the States, that induced the Convention to leave it, as a matter of future adjustment") 3 Farrand 298; and Edmund Randolph's explanation to the Virginia Convention ("I will risk my property on the certainty, that [Congress] will institute the trial by jury in such manner as shall accommodate the conveniences of the inhabitants of every state: the difficulty of ascertaining this accommodation, was the principal cause of its not being provided for") 3 Farrand 309

> 465, 478 (1888). This proposition was again put forward by Mr. Justice Gray speaking for the Court in *United States* v. *Wong Kim Ark*, 169 U. S. 649 (1898), where the Court was called upon to define the term 'citizen' as used in the Constitution. 'The Constitution nowhere defines the meaning of these words [the Citizenship Clause]. . . . In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution.' 169 U. S., at 654. History continues to be a wellspring of constitutional interpretation. Indeed, history was even invoked by the Court in such decisions as *Townsend* v. *Sain*, 372 U. S. 293 (1963), and *Fay* v. *Noia*, 372 U. S. 391 (1963), where it purported to interpret the constitutional provision for habeas corpus according to the 'historic conception of the writ' and took note that the guarantee was one rooted in common law and should be so interpreted. Cf. *United States* v. *Brown*, 381 U. S. 437, 458 (1965)." *Williams* v. *Florida*, 399 U. S., at 123–124.

When a historical approach is applied to the issue at hand, it cannot be doubted that the Framers envisioned a jury of 12 when they referred to trial by jury. It is true that at the time the Seventh Amendment was adopted, jury usage differed in several respects among the States. See generally Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289 (1966). But, for the most part at least, these differences did not extend to jury size which seems to have been uniform and, indeed, had remained so for centuries. One authority has noted that as early as 1164, the Constitutions of Clarendon provided that "where, in the case of a layman so rich and powerful that no individual dares

to appear against him, 'the sheriff shall cause twelve legal men of the neighbourhood, or of the vill, to take an oath in the presence of the bishop that they will declare the truth about it.' " Wells, The Origin of the Petit Jury, 27 L. Q. Rev. 347 (1911). As Professor Scott wrote, "At the beginning of the thirteenth century twelve was indeed the usual but not the invariable number. But by the middle of the fourteenth century the requirement of twelve had probably become definitely fixed. Indeed this number finally came to be regarded with something like superstitious reverence." A. Scott, Fundamentals of Procedure in Actions at Law 75–76 (1922) (footnotes omitted). See also 1 W. Holdsworth, A History of English Law 324–325 (7th ed. 1956).

To be sure, not every element of English common law was carried over without change in the Colonies. In the case of jury trial, however, "in general this venerable and highly popular institution was adopted in the colonies in its English form at an early date." Reinsch, The English Common Law in the Early American Colonies, in 1 Select Essays in Anglo-American Legal History 412 (1907). As the Court concluded in *Williams* v. *Florida*, "[t]he States that had adopted Constitutions by the time of the Philadelphia Convention in 1787 appear for the most part to have either explicitly provided that the jury would consist of 12, see Va. Const. of 1776, § 8, in 7 F. Thorpe, Federal and State Constitutions 3813 (1909), or to have subsequently interpreted their jury trial provisions to include that requirement." 399 U. S., at 98–99, n. 45.[7]

[7] I do not mean to suggest that isolated experiments with juries of different sizes cannot be found in colonial history. Indeed, when one considers the number of jurisdictions and the span of time involved, it would be surprising if there were no aberrations. Some scholars have argued from the few cases involving juries consisting of more or less than 12 that there was no common-law requirement

On the basis of this historical record, this Court has more than once concluded that the Seventh Amendment guarantees the preservation of 12-man juries.

As the Court, speaking through Mr. Justice Gray, said in *Capital Traction Co.* v. *Hof*,

> "'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is . . . a trial by a jury of twelve men before an officer vested with authority to cause them

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as to jury size in the Colonies. See, *e. g.*, Fisher, The Seventh Amendment and the Common Law: No Magic in Numbers, 56 F. R. D. 507 (1973). In fact, however, the cases cited for this proposition seem to constitute no more than the exceptions which prove the rule.

Fisher, for example, bases his thesis on the fact that Maryland used a jury of 10 in one case in 1682 and a jury of 11 in another case that year and that Delaware used juries of 11, 7, and 13 in three cases tried between 1676 and 1705. See *id.*, at 530. But when one remembers that thousands of civil and criminal cases were tried during the prerevolutionary period, these five apparently isolated instances prove virtually nothing. Similarly, South Carolina's provision for a jury of less than 12 in the "Court for the Trial of Slaves and Persons of Color," *ibid.*, was obviously limited to the peculiar circumstance of persons who, at that time, were considered to be without civil rights of any kind. Fisher's reliance on petitions from the citizens of Anson, Orange, and Rowan Counties for juries of less than 12, *ibid.*, is unaccountable since these petitions were in fact rejected and the smaller juries never impaneled. See *id.*, at 530–531, n. 87.

Fisher's final example is particularly revealing. Just prior to the Revolution, New Jersey passed an act providing for six-man juries in small-court cases. *Id.*, at 531. The law was challenged in the case of *Holmes* v. *Walton*, in 1780, in which the defendant argued "the jury sworn to try the above cause and on whose verdict judgment was entered, consisted of six men only, when by the laws of the land it should have consisted of twelve men." *Id.*, at 532 n. 88. The New Jersey Supreme Court rejected this argument and upheld the verdict. A scant month later, however, the New Jersey Legislature reversed this decision and reinstituted the right to 12-man juries. See *ibid.*

> to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict . . . . This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. Yet there are unequivocal statements of it to be found in the books." 174 U. S., at 13–14.

Cf. *Patton* v. *United States,* 281 U. S. 276 (1930); *Maxwell* v. *Dow,* 176 U. S. 581 (1900); *American Publishing Co.* v. *Fisher,* 166 U. S. 464 (1897); *Springville* v. *Thomas,* 166 U. S. 707 (1897).

The Court today elects to abandon the certainty of this historical test, as well as the many cases which support it, in favor of a vaguely defined functional analysis which asks not what the Framers meant by "trial by jury" but rather whether some substitute for the common-law jury performs the same functions as a jury and serves as an adequate substitute for one. It is true that some of our prior cases support a functional approach to an evaluation of procedural innovations which surround jury trials. The Court has in the past upheld such devices as jury interrogatories and reports of special masters as not interfering with the functioning of a common-law jury. See, *e. g., Ex parte Peterson,* 253 U. S. 300 (1920); *Walker* v. *New Mexico & S. P. R. Co.,* 165 U. S. 593 (1897). But see *Dimick* v. *Schiedt,* 293 U. S. 474 (1935). But I know of no prior case which has utilized a functional analysis to evaluate the very composition of the civil jury.

I submit that the reason for the absence of such cases derives from the inherent nature of the problem. It is possible to determine in a principled fashion whether the appurtenances which surround a jury interfere with the essential functioning of that institution. One can

evaluate whether additur, for example, or directed verdicts interfere with the jury's role as it existed at common law. See, *e. g., Galloway* v. *United States,* 319 U. S. 372 (1943); *Dimick* v. *Schiedt, supra.* But the composition of the jury itself is a matter of arbitrary, *a priori* definition. As Mr. Justice Harlan argued "[t]he right to a trial by jury . . . has no enduring meaning apart from historical form." *Williams* v. *Florida,* 399 U. S., at 125 (separate opinion).

It is senseless, then, to say that a panel of six constitutes a "jury" without first defining what one means by a jury, and that initial definition must, in the nature of things, be arbitrary. One could, of course, define the term "jury" as being a body of six or more laymen. But the line between five and six would then be just as arbitrary as the line between 11 and 12. There is no way by reference to abstract principle or "function" that one can determine that six is "enough," five is "too small," and 20 "too large."[8] These evaluations can only be made by reference to a hypothetical ideal jury of some arbitrarily chosen size. All one can say is that a jury of six functions less like a jury of 12 than would

[8] The Court asserts that "[w]hat is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community." See *ante,* at 160 n. 16. We can bypass for the moment the intriguing question of where the majority finds this requirement in the words of the Seventh Amendment. For our purposes, it is sufficient to note that, upon examination, this "test" turns out to be no test at all. It may be that the ideal jury would provide "enough" group deliberation and community representation. But the question in this case is how much is "enough." Obviously, the larger the jury the more group representation it will provide. See n. 1, *supra.* Merely observing that a certain level of group representation is constitutionally required fails to tell us what that level is. And, more significantly, it fails to tell us how to go about deciding what that level is.

a jury of, say eight, but more like a jury of 12 than would a jury of three.[9] Although I think it clear that my Brethren would reject, for example, a jury of one, the Court does not begin to tell us how it would go about drawing a line in a nonarbitrary fashion, and it is obvious that in matters of degree of this kind, nonarbitrary line drawing is a logical impossibility.

Of course, there is nothing intrinsically wrong with drawing arbitrary lines and, indeed, as argued above, in order to resolve certain problems they are essential. Thus, this Court has not hesitated in the past to rely on arbitrary demarcations in cases where constitutional rights depend on matters of degree. See, *e. g., Burns* v. *Fortson,* 410 U. S. 686 (1973). But in cases where arbitrary lines are necessary, I would have thought it more consonant with our limited role in a constitutional democracy to draw them with reference to the fixed bounds of the Constitution rather than on a wholly ad hoc basis.

I think history will bear out the proposition that when constitutional rights are grounded in nothing more solid than the intuitive, unexplained sense of five Justices that a certain line is "right" or "just," those rights are certain to erode and, eventually, disappear altogether. Today, a majority of this Court may find six-man juries to represent a proper balance between competing demands of expedition and group representation. But as dockets become more crowded and pressures on jury trials grow, who is to say that some future Court will not find three, or two, or one a number large enough to satisfy its unexplicated sense of justice? It should

[9] It thus will not do to argue, as has my Brother WHITE, that one "can get off the 'slippery slope' before he reaches the bottom. . . ." *Williams* v. *Florida,* 399 U. S. 78, 91 n. 28 (1970). This begs the question how one knows at what point to get off—a question for which the Court apparently has no answer.

be clear that constitutional rights which are so vulnerable to pressures of the moment are not really protected by the Constitution at all. As Mr. Justice Black never tired of arguing, "the accordion-like qualities of this philosophy must inevitably imperil all the individual liberty safeguards specifically enumerated in the Bill of Rights." *Rochin* v. *California*, 342 U. S. 165, 177 (1952) (Black, J., concurring). See also *Duncan* v. *Louisiana*, 391 U. S. 145, 169 (1968) (Black, J., concurring).

Since some definition of "jury" must be chosen, I would therefore rely on the fixed bounds of history which the Framers, by drafting the Seventh Amendment, meant to "preserve." I agree with MR. JUSTICE POWELL'S observation in the Sixth Amendment context that determining the content of the right to jury trial should involve a "careful evaluation of, and strict adherence to the limitations on, that right as it was known . . . at common law." *Johnson* v. *Louisiana*, 406 U. S., at 370 n. 6 (separate opinion). It may well be that the number 12 is no more than a "historical accident" and is "wholly without significance 'except to mystics.'" *Williams* v. *Florida*, *supra*, at 102. But surely there is nothing more significant about the number six, or three, or one. The line must be drawn somewhere, and the difference between drawing it in the light of history and drawing it on an ad hoc basis is, ultimately, the difference between interpreting a constitution and making it up as one goes along.

II

The arbitrary nature of the line which must be drawn in determining permissible jury size highlights another anomaly in the Court's opinion. Normally, in our system we leave the inevitable process of arbitrary line drawing to the Legislative Branch, which is far better equipped to make ad hoc compromises. In the past, we

have therefore given great deference to legislative decisions in cases where the line must be drawn somewhere and cannot be precisely delineated by reference to principle. This Court has involved itself in the sticky business of separating cases along a continuum only when the Constitution clearly compels it to do so and when the legislature has plainly defaulted.

Today, the Court turns this practice inside out. It rejects what I take to be a clearly articulated legislative decision—a decision, incidentally, which is fully consonant with constitutional requirements—in order to draw its own arbitrary line. It does so, moreover, without any explanation for why it finds the legislative determination unsatisfactory and, indeed, with barely any explanation at all.

A

Title 28 U. S. C. § 2072 requires that the Rules of Civil Procedure promulgated by this Court "shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." As the Court recognizes, this requirement is made applicable to local rules of procedure by 28 U. S. C. § 2071, which requires that "[s]uch rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

The Court's treatment of this statutory requirement is, to say the least, peculiar. When explicating the Seventh Amendment, my Brethren hold that the Framers intended to govern only the types of trials in which the jury right attaches rather than to fix the common-law characteristics of the jury. Their reason for reaching this conclusion is that the Seventh Amendment, by its terms, guarantees the right to a jury trial "[i]n suits at common law" and not as it existed at common law. This language, the Court says, "is not directed to jury

characteristics, such as size, but rather defines the kind of cases for which jury trial is preserved, namely, 'suits at common law.' " *Ante*, at 152. This argument from the language of the Seventh Amendment is fair enough, although for the reasons given in the preceding section, I find it ultimately unpersuasive. But what, then, are we to say when interpreting a provision which guarantees jury trials, not "in suits at common law," but "as at common law"? By the Court's own reasoning, it would seem that this phrase should be read to guarantee the preservation of jury characteristics as they existed at common law.

Uninhibited by the seeming restraints of its own logic, however, my Brethren proceed to read this phrase to preserve juries in cases tried at common law in the face of the merger of law and equity. But if we are again to take the Court at its own word, this is precisely the result achieved by the Seventh Amendment of its own force. There is, of course, a well-recognized canon of construction which requires courts to read statutory provisions so that, when possible, no part of the statute is superfluous. See, *e. g.*, 2 J. Sutherland, Statutes and Statutory Construction § 4705 (3d ed. 1943), and cases cited therein. Yet the Court's reading of this statute creates not just a redundancy, but a double redundancy. If the framers of § 2072 had intended merely to preserve jury trials in cases at common law, then no statute at all would have been necessary since, as the Court recognizes, the Seventh Amendment by itself is sufficient to accomplish this purpose. Yet Congress not only passed a statute—it adopted a provision securing trial by jury both "as declared by the Seventh Amendment" and "as at common law." If one accepts for the moment the Court's premise that the Seventh Amendment preserves only the right to juries in common-law cases,

Congress' addition of the phrase "as at common law" is explicable only if the legislature also intended to protect jury characteristics from change.

My Brethren chose to reject this clear meaning of the statute and to read it instead in a manner which not only makes it redundant but also, as demonstrated in the previous section, raises the gravest constitutional questions. Yet the only argument I can discern for reaching this result is the Court's stated reluctance to "saddle archaic and presently unworkable common-law procedures upon the federal courts." With all respect, I had not thought it our function to determine which statutory requirements are "archaic" and "unworkable" and to enforce only those which we find to be efficient and up to date. The Court asserts that "[i]f Congress had meant to prescribe . . . common-law features [for juries] . . . 'it knew how to use express language to that effect.'" But I, for one, would be hard pressed to think of language which more expressly guarantees the jury's common-law features than the statement that the right of trial by jury shall be preserved "as at common law." So long as this is the command of Congress, I had thought it our duty to obey, no matter how "archaic" and "unworkable" the statutory requirement.

B

Nor is the statute the end of the matter. Federal Rule Civ. Proc. 48 provides in relevant part that "[t]he parties may stipulate that the jury shall consist of any number less than t welve." It hardly need be demonstrated that this provis n is flatly inconsistent with local Rule 13 (d) (1). Th number 11, for example, falls within the class of "any number less than twelve," so that Rule 48 requires that the parties be permitted to stipulate to a jury of 11. Yet the local rule, which requires that "[a]

jury for the trial of civil cases shall consist of six persons" clearly would not permit a jury of 11, even if the parties stipulated to such a jury.

The Court's contention that Rule 48 "deals only with a stipulation *by* '[*t*]*he parties*'" and "does not purport to prevent *court rules* which provide for civil juries of reduced size," *ante*, at 164, therefore passes my understanding. It is true enough that Rule 48 deals with stipulations by the parties, but it expressly says that the court rules must permit such stipulations so long as the number stipulated is "any number less than twelve." Since the numbers seven through 11 are numbers less than 12, and since the local rule does not permit stipulations of these numbers, the two rules are in conflict and the local rule must therefore fall. See 28 U. S. C. § 2071; Fed. Rule Civ. Proc. 83.

Of course, Rule 48 does not on its face guarantee a jury of 12. That function is arguably performed by Rule 38 (a) which provides that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." But as the Court itself recognizes, the framers of Rule 48 clearly presupposed a jury of 12 in the absence of stipulation. Indeed, there is no way to make sense of a provision which permits stipulations of any number less than 12 unless one assumes that in the absence of a stipulation, the jury would consist of 12. I am thus once again at a loss to understand why the Court strains to escape the plain intention of the Rule's drafters in order to wrestle with grave constitutional questions that could easily have been avoided.

III

It might appear to some anomalous after *Williams* to hold that 12-man civil juries are constitutionally required in federal cases. As Judge Wisdom has argued, "[w]hat-

ever one considers the role of a civil jury and whatever importance attaches to that role, . . . no one has ever contended that the function of the civil jury is *more* important than that of the criminal jury." *Cooley* v. *Strickland Transportation Co.*, 459 F. 2d 779, 781 (1972).

There is, of course, force to that point and a certain rudimentary logic to the proposition that if a man is entitled to a jury of only six when his very liberty is at stake, he should not be entitled to more when mere property hangs in the balance. But our function is limited to interpreting the Constitution. We are not empowered to decide as a matter of policy the cases in which 12-man juries should be guaranteed. As argued above, our prior decision on jury size arose in the state context and involved interpretation of a different constitutional provision. That decision simply does not require that we approve six-man federal juries in civil cases. As Mr. Justice Sutherland observed almost 40 years ago when the common-law jury was under attack from a different source, "this court in a very special sense is charged with the duty of construing and upholding the Constitution; and in the discharge of that important duty, it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land." *Dimick* v. *Schiedt*, 293 U. S., at 485.

I find that response dispositive. The Constitution is, in the end, a unitary, cohesive document and every time any piece of it is ignored or interpreted away in the name of expedience, the entire fragile endeavor of constitutional government is made that much more insecure. This observation is as pertinent to the Seventh Amendment as it is to the First, or Fourteenth, or any other part of the Constitution. Indeed, as the *Dimick* court held, "[m]aintenance of the jury as a fact-finding body is of

such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Id.*, at 486. In my judgment, my Brethren have not given this curtailment of the jury right the careful scrutiny which the problem demands. I must, therefore, respectfully dissent.

MR. JUSTICE POWELL, dissenting.

I share the view of MR. JUSTICE DOUGLAS that local Rule 13 (d)(1) is incompatible with the Federal Rules of Civil Procedure, and this would require a reversal of the present case. Accordingly I do not reach the constitutional issue under the Seventh Amendment which is addressed by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL in their scholarly opinions, *ante*, pp. 149, 166. Cf. *Johnson* v. *Louisiana*, 406 U. S. 356, 366–380 (1972) (opinion of POWELL, J.).

Syllabus

KEYES ET AL. *v.* SCHOOL DISTRICT NO. 1, DENVER, COLORADO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 71–507. Argued October 12, 1972—Decided June 21, 1973

Petitioners sought desegregation of the Park Hill area schools in Denver and, upon securing an order of the District Court directing that relief, expanded their suit to secure desegregation of the remaining schools of the Denver school district, particularly those in the core city area. The District Court denied the further relief, holding that the deliberate racial segregation of the Park Hill schools did not prove a like segregation policy addressed specifically to the core city schools and requiring petitioners to prove *de jure* segregation for each area that they sought to have desegregated. That court nevertheless found that the segregated core city schools were educationally inferior to "white" schools elsewhere in the district and, relying on *Plessy* v. *Ferguson*, 163 U. S. 537, ordered the respondents to provide substantially equal facilities for those schools. This latter relief was reversed by the Court of Appeals, which affirmed the Park Hill ruling and agreed that Park Hill segregation, even though deliberate, proved nothing regarding an overall policy of segregation. *Held:*

1. The District Court, for purposes of defining a "segregated" core city school, erred in not placing Negroes and Hispanos in the same category since both groups suffer the same educational inequities when compared with the treatment afforded Anglo students. Pp. 195–198.

2. The courts below did not apply the correct legal standard in dealing with petitioners' contention that respondent School Board had the policy of deliberately segregating the core city schools. Pp. 198–213.

(a) Proof that the school authorities have pursued an intentional segregative policy in a substantial portion of the school district will support a finding by the trial court of the existence of a dual system, absent a showing that the district is divided into clearly unrelated units. Pp. 201–203.

(b) On remand the District Court should decide initially whether respondent School Board's deliberately segregative policy

respecting the Park Hill schools constitutes the whole Denver school district a dual school system. Pp. 204–205.

(c) Where, as in this case, a policy of intentional segregation has been proved with respect to a significant portion of the school system, the burden is on the school authorities (regardless of claims that their "neighborhood school policy" was racially neutral) to prove that their actions as to other segregated schools in the system were not likewise motivated by a segregative intent. Pp. 207–213.

445 F. 2d 990, modified and remanded.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a separate opinion, *post*, p. 214. BURGER, C. J., concurred in the result. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 217. REHNQUIST, J., filed a dissenting opinion, *post*, p. 254. WHITE, J., took no part in the decision of the case.

James M. Nabrit III and *Gordon G. Greiner* argued the cause for petitioners. With them on the brief were *Jack Greenberg, Charles Stephen Ralston, Norman J. Chachkin, Robert T. Connery,* and *Anthony G. Amsterdam.*

William K. Ris argued the cause for respondents. With him on the brief were *Thomas E. Creighton, Benjamin L. Craig,* and *Michael H. Jackson.**

*Briefs of *amici curiae* urging reversal were filed by *Melvin L. Wulf, Sanford Jay Rosen,* and *Edwin S. Kahn* for the American Civil Liberties Union et al.; by *Stephen J. Pollak, Richard M. Sharp, David Rubin, Larry F. Hobbs,* and *Leonard N. Waldbaum* for the National Education Association et al.; by *Arnold Forster, Paul Hartman, Paul S. Berger, Joseph B. Robison,* and *Samuel Rabinove* for the Anti-Defamation League of B'nai B'rith et al.; and by *Mario G. Obledo* and *Michael Mendelson* for the Mexican American Legal Defense and Educational Fund.

Briefs of *amici curiae* urging affirmance were filed by *Theodore L. Sendak,* Attorney General, *Wendell C. Hamacher,* Deputy Attorney General, and *William F. Harvey* for the State of Indiana; by

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This school desegregation case concerns the Denver, Colorado, school system. That system has never been operated under a constitutional or statutory provision that mandated or permitted racial segregation in public education.[1] Rather, the gravamen of this action, brought in June 1969 in the District Court for the District of Colorado by parents of Denver schoolchildren, is that respondent School Board alone, by use of various techniques such as the manipulation of student attendance zones, schoolsite selection and a neighborhood school policy, created or maintained racially or ethnically (or both racially and ethnically) segregated schools throughout the school district, entitling petitioners to a decree directing desegregation of the entire school district.

The boundaries of the school district are coterminous with the boundaries of the city and county of Denver. There were in 1969, 119 schools[2] with 96,580 pupils

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Thomas A. Shannon, Donald R. Lincoln, and *Paul D. Engstrand* for San Diego Unified School District; and by *Willis Hannawalt* and *Vivian Hannawalt* for Robert G. Nelson et al.

Briefs of *amici curiae* were filed by *Solicitor General Griswold, Assistant Attorney General Norman, James P. Turner, Brian K. Landsberg,* and *Thomas M. Keeling* for the United States, and by *David I. Caplan* for the Jewish Rights Council, Inc.

[1] To the contrary, Art. IX, § 8, of the Colorado Constitution expressly prohibits any "classification of pupils . . . on account of race or color." As early as 1927, the Colorado Supreme Court held that a Denver practice of excluding black students from school programs at Manual High School and Morey Junior High School violated state law. *Jones* v. *Newlon,* 81 Colo. 25, 253 P. 386.

[2] There were 92 elementary schools, 15 junior high schools, 2 junior-senior high schools, and 7 senior high schools. In addition, the Board operates an Opportunity School, a Metropolitan Youth Education Center, and an Aircraft Training Facility.

in the school system. In early 1969, the respondent School Board adopted three resolutions, Resolutions 1520, 1524, and 1531, designed to desegregate the schools in the Park Hill area in the northeast portion of the city. Following an election which produced a Board majority opposed to the resolutions, the resolutions were rescinded and replaced with a voluntary student transfer program. Petitioners then filed this action, requesting an injunction against the rescission of the resolutions and an order directing that the respondent School Board desegregate and afford equal educational opportunity "for the School District as a whole." App. 32a. The District Court found that by the construction of a new, relatively small elementary school, Barrett, in the middle of the Negro community west of Park Hill, by the gerrymandering of student attendance zones, by the use of so-called "optional zones," and by the excessive use of mobile classroom units, among other things, the respondent School Board had engaged over almost a decade after 1960 in an unconstitutional policy of deliberate racial segregation with respect to the Park Hill schools.[3] The court therefore ordered the Board to desegregate those schools through the implementation of the three rescinded resolutions. 303 F. Supp. 279 and 289 (1969).

Segregation in Denver schools is not limited, however, to the schools in the Park Hill area, and not satisfied with their success in obtaining relief for Park Hill, petitioners pressed their prayer that the District Court order desegregation of all segregated schools in the city of Denver, particularly the heavily segregated schools in the core city area.[4] But that court concluded that its

[3] The so-called "Park Hill schools" are Barrett, Stedman, Hallett, Smith, Philips, and Park Hill Elementary Schools; and Smiley Junior High School. East High School serves the area but is located outside of it. (See map following p. 214.)

[4] The so-called "core city schools" which are said to be segregated

finding of a purposeful and systematic program of racial segregation affecting thousands of students in the Park Hill area did not, in itself, impose on the School Board an affirmative duty to eliminate segregation throughout the school district. Instead, the court fractionated the district and held that petitioners had to make a fresh showing of *de jure* segregation in each area of the city for which they sought relief. Moreover, the District Court held that its finding of intentional segregation in Park Hill was not in any sense material to the question of segregative intent in other areas of the city. Under this restrictive approach, the District Court concluded that petitioners' evidence of intentionally discriminatory School Board action in areas of the district other than Park Hill was insufficient to "dictate the conclusion that this is *de jure* segregation which calls for an all-out effort to desegregate. It is more like *de facto* segregation, with respect to which the rule is that the court cannot order desegregation in order to provide a better balance." 313 F. Supp. 61, 73 (1970).

Nevertheless, the District Court went on to hold that the proofs established that the segregated core city schools were educationally inferior to the predominantly "white" or "Anglo" schools in other parts of the district—that is, "separate facilities . . . unequal in the quality of education provided." *Id.*, at 83. Thus, the court held that, under the doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), respondent School Board constitutionally "must at a minimum . . . offer an equal educational opportunity," 313 F. Supp., at 83, and, therefore,

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are Boulevard, Bryant-Webster, Columbine, Crofton, Ebert, Elmwood, Elyria, Fairmont, Fairview, Garden Place, Gilpin, Greenlee, Harrington, Mitchell, Smedley, Swansea, Whittier, Wyatt, and Wyman Elementary Schools; Baker, Cole, and Morey Junior High Schools; and East, West, and Manual High Schools. (See map following p. 214.)

although all-out desegregation "could not be decreed, . . . the only feasible and constitutionally acceptable program—the only program which furnishes anything approaching substantial equality—is a system of desegregation and integration which provides compensatory education in an integrated environment." 313 F. Supp. 90, 96 (1970). The District Court then formulated a varied remedial plan to that end which was incorporated in the Final Decree.[5]

Respondent School Board appealed, and petitioners cross-appealed, to the Court of Appeals for the Tenth Circuit. That court sustained the District Court's finding that the Board had engaged in an unconstitutional policy of deliberate racial segregation with respect to the Park Hill schools and affirmed the Final Decree in that respect. As to the core city schools, however, the Court of Appeals reversed the legal determination of the District Court that those schools were maintained in violation

[5] The first of the District Court's four opinions, 303 F. Supp. 279, was filed July 31, 1969, and granted petitioners' application for a preliminary injunction. The second opinion, 303 F. Supp. 289, was filed August 14, 1969, and made supplemental findings and conclusions. The third opinion, 313 F. Supp. 61, filed March 21, 1970, was the opinion on the merits. The fourth opinion, 313 F. Supp. 90, was on remedy and was filed May 21, 1970. The District Court filed an unreported opinion on October 19, 1971, in which relief was extended to Hallett and Stedman Elementary Schools which were found by the court in its July 31, 1969, opinion to be purposefully segregated but were not included within the scope of the three 1969 Board resolutions. The Court of Appeals filed five unreported opinions: on August 5, 1969, vacating preliminary injunctions; on August 27, 1969, staying preliminary injunction; on September 15, 1969, on motion to amend stay; on October 17, 1969, denying motions to dismiss; and on March 26, 1971, granting stay. MR. JUSTICE BRENNAN, on August 29, 1969, filed an opinion reinstating the preliminary injunction, 396 U. S. 1215, and on April 26, 1971, this Court entered a *per curiam* order vacating the Court of Appeals' stay, 402 U. S. 182.

of the Fourteenth Amendment because of the unequal educational opportunity afforded, and therefore set aside so much of the Final Decree as required desegregation and educational improvement programs for those schools. 445 F. 2d 990 (1971). In reaching that result, the Court of Appeals also disregarded respondent School Board's deliberate racial segregation policy respecting the Park Hill schools and accepted the District Court's finding that petitioners had not proved that respondent had a like policy addressed specifically to the core city schools.

We granted petitioners' petition for certiorari to review the Court of Appeals' judgment insofar as it reversed that part of the District Court's Final Decree as pertained to the core city schools. 404 U. S. 1036 (1972). The judgment of the Court of Appeals in that respect is modified to vacate instead of reverse the Final Decree. The respondent School Board has cross-petitioned for certiorari to review the judgment of the Court of Appeals insofar as it affirmed that part of the District Court's Final Decree as pertained to the Park Hill schools. Docket No. 71–572, *School District No. 1* v. *Keyes*. The cross-petition is denied.

I

Before turning to the primary question we decide today, a word must be said about the District Court's method of defining a "segregated" school. Denver is a tri-ethnic, as distinguished from a bi-racial, community. The overall racial and ethnic composition of the Denver public schools is 66% Anglo, 14% Negro, and 20% Hispano.[6] The District Court, in assessing the question of

[6] The parties have used the terms "Anglo," "Negro," and "Hispano" throughout the record. We shall therefore use those terms. "Hispano" is the term used by the Colorado Department of Education to refer to a person of Spanish, Mexican, or Cuban heritage. Colorado Department of Education, Human Relations in Colorado,

de jure segregation in the core city schools, preliminarily resolved that Negroes and Hispanos should not be placed in the same category to establish the segregated character of a school. 313 F. Supp., at 69. Later, in determining the schools that were likely to produce an inferior educational opportunity, the court concluded that a school would be considered inferior only if it had "a concentration of either Negro or Hispano students in the general area of 70 to 75 percent." *Id.*, at 77. We intimate no opinion whether the District Court's 70%-to-75% requirement was correct. The District Court used those figures to signify educationally inferior schools, and there is no suggestion in the record that those same figures were or would be used to define a "segregated" school in the *de jure* context. What is or is not a segregated school will necessarily depend on the facts of each particular case. In addition to the racial and ethnic composition of a school's student body, other factors, such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school, must be taken into consideration. The District Court has recognized these specific factors as elements of the definition of a "segregated" school, *id.*, at 74, and we may therefore infer that the court will consider them again on remand.

A Historical Record 203 (1968). In the Southwest, the "Hispanos" are more commonly referred to as "Chicanos" or "Mexican-Americans."

The more specific racial and ethnic composition of the Denver public schools is as follows:

	Anglo		*Negro*		*Hispano*	
Pupils	No.	%	No.	%	No.	%
Elementary	33,719	61.8	8,297	15.2	12,570	23.0
Junior High	14,848	68.7	2,893	13.4	3,858	17.9
Senior High	14,852	72.8	2,442	12.0	3,101	15.2
Total	63,419	65.7	13,632	14.1	19,529	20.2

We conclude, however, that the District Court erred in separating Negroes and Hispanos for purposes of defining a "segregated" school. We have held that Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment. *Hernandez* v. *Texas*, 347 U. S. 475 (1954). See also *United States* v. *Texas Education Agency*, 467 F. 2d 848 (CA5 1972) (*en banc*); *Cisneros* v. *Corpus Christi Independent School District*, 467 F. 2d 142 (CA5 1972) (*en banc*); *Alvarado* v. *El Paso Independent School District*, 445 F. 2d 1011 (CA5 1971); *Soria* v. *Oxnard School District*, 328 F. Supp. 155 (CD Cal. 1971); *Romero* v. *Weakley*, 226 F. 2d 399 (CA9 1955). Indeed, the District Court recognized this in classifying predominantly Hispano schools as "segregated" schools in their own right. But there is also much evidence that in the Southwest Hispanos and Negroes have a great many things in common. The United States Commission on Civil Rights has recently published two Reports on Hispano education in the Southwest.[7] Focusing on students in the States of Arizona, California, Colorado, New Mexico, and Texas, the Commission concluded that Hispanos suffer from the same educational inequities as Negroes and American Indians.[8] In fact, the District Court itself recognized that "[o]ne of the things which the Hispano has in common with the Negro is economic and cultural deprivation

[7] United States Commission on Civil Rights, Mexican American Education Study, Report 1, Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest (Apr. 1971); United States Commission on Civil Rights, Mexican American Educational Series, Report 2, The Unfinished Education (Oct. 1971).

[8] The Commission's second Report, on p. 41, summarizes its findings:

"The basic finding of this report is that minority students in the Southwest—Mexican Americans, blacks, American Indians—do not obtain the benefits of public education at a rate equal to that of their Anglo classmates."

and discrimination." 313 F. Supp., at 69. This is agreement that, though of different origins, Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of "segregated" schools.

II

In our view, the only other question that requires our decision at this time is that subsumed in Question 2 of the questions presented by petitioners, namely, whether the District Court and the Court of Appeals applied an incorrect legal standard in addressing petitioners' contention that respondent School Board engaged in an unconstitutional policy of deliberate segregation in the core city schools. Our conclusion is that those courts did not apply the correct standard in addressing that contention.[9]

Petitioners apparently concede for the purposes of this case that in the case of a school system like Denver's, where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action. Petitioners proved that for almost a decade after 1960 respondent School Board had engaged in an unconstitutional policy of deliberate racial segregation in the Park Hill schools. Indeed, the District Court found that "[b]etween 1960 and 1969 the Board's policies

[9] Our Brother REHNQUIST argues in dissent that the Court somehow transgresses the "two-court" rule. *Post*, at 264. But at this stage, we have no occasion to review the factual findings concurred in by the two courts below. Cf. *Neil* v. *Biggers*, 409 U. S. 188 (1972). We address only the question whether those courts applied the correct legal standard in deciding the case as it affects the core city schools.

with respect to these northeast Denver schools show an undeviating purpose to isolate Negro students" in segregated schools "while preserving the Anglo character of [other] schools." 303 F. Supp., at 294. This finding did not relate to an insubstantial or trivial fragment of the school system. On the contrary, respondent School Board was found guilty of following a deliberate segregation policy at schools attended, in 1969, by 37.69% of Denver's total Negro school population, including one-fourth of the Negro elementary pupils, over two-thirds of the Negro junior high pupils, and over two-fifths of the Negro high school pupils.[10] In addition,

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[10] The Board was found guilty of intentionally segregative acts of one kind or another with respect to the schools listed below. (As to Cole and East, the conclusion rests on the rescission of the resolutions.)

PUPILS 1968–1969

	Anglo	*Negro*	*Hispano*	*Total*
Barrett	1	410	12	423
Stedman	27	634	25	686
Hallett	76	634	41	751
Park Hill	684	223	56	963
Philips	307	203	45	555
Smiley Jr. High	360	1,112	74	1,546
Cole Jr. High	46	884	289	1,219
East High	1,409	1,039	175	2,623
Subtotal Elementary	1,095	2,104	179	3,378
Subtotal Jr. High	406	1,996	363	2,765
Subtotal Sr. High	1,409	1,039	175	2,623
Total	2,910	5,139	717	8,766

The total Negro school enrollment in 1968 was:

Elementary	8,297
Junior High	2,893
Senior High	2,442

Thus, the above-mentioned schools included:

Elementary	25.36% of all Negro elementary pupils
Junior High	68.99% of all Negro junior high pupils
Senior High	42.55% of all Negro senior high pupils
Total	37.69% of all Negro pupils

there was uncontroverted evidence that teachers and staff had for years been assigned on the basis of a minority teacher to a minority school throughout the school system. Respondent argues, however, that a finding of state-imposed segregation as to a substantial portion of the school system can be viewed in isolation from the rest of the district, and that even if state-imposed segregation does exist in a substantial part of the Denver school system, it does not follow that the District Court could predicate on that fact a finding that the entire school system is a dual system. We do not agree. We have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. Rather, we have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) (*Brown I*), the State automatically assumes an affirmative duty "to effectuate a transition to a racially nondiscriminatory school system," *Brown* v. *Board of Education*, 349 U. S. 294, 301 (1955) (*Brown II*), see also *Green* v. *County School Board*, 391 U. S. 430, 437–438 (1968), that is, to eliminate from the public schools within their school system "all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 15 (1971).[11]

[11] Our Brother REHNQUIST argues in dissent that *Brown* v. *Board of Education* did not impose an "affirmative duty to integrate" the schools of a dual school system but was only a "prohibition against discrimination" "in the sense that the assignment of a child to a particular school is not made to depend on his race . . . ." *Infra*, at 258. That is the interpretation of *Brown* expressed 18 years ago by a three-judge court in *Briggs* v. *Elliott*, 132 F. Supp. 776, 777

This is not a case, however, where a statutory dual system has ever existed. Nevertheless, where plaintiffs prove that the school authorities have carried out a systematic program of segregation affecting a substantial portion of the students, schools, teachers, and facilities within the school system, it is only common sense to conclude that there exists a predicate for a finding of the existence of a dual school system. Several considerations support this conclusion. First, it is obvious that a practice of concentrating Negroes in certain schools by structuring attendance zones or designating "feeder" schools on the basis of race has the reciprocal effect of keeping other nearby schools predominantly white.[12] Similarly, the practice of building a school—such as the Barrett Elementary School in this case—to a certain size and in a certain location, "with conscious knowledge that it would

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(1955): "The Constitution, in other words, does not require integration. It merely forbids discrimination." But *Green* v. *County School Board,* 391 U. S. 430, 437–438 (1968), rejected that interpretation insofar as *Green* expressly held that "School boards . . . operating state-compelled dual systems were nevertheless clearly charged [by *Brown II*] with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* remains the governing principle. *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19 (1969); *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 15 (1971). See also *Kelley* v. *Metropolitan County Board of Education,* 317 F. Supp. 980, 984 (1970).

[12] As a former School Board President who testified for the respondents put it: "Once you change the boundary of any one school, it is affecting all the schools . . . ." Testimony of Mrs. Lois Heath Johnson on cross-examination. App. 951a–952a.

Similarly, Judge Wisdom has recently stated:

"Infection at one school infects all schools. To take the most simple example, in a two school system, all blacks at one school means all or almost all whites at the other." *United States* v. *Texas Education Agency,* 467 F. 2d 848, 888 (CA5 1972).

be a segregated school," 303 F. Supp., at 285, has a substantial reciprocal effect on the racial composition of other nearby schools. So also, the use of mobile classrooms, the drafting of student transfer policies, the transportation of students, and the assignment of faculty and staff, on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further racial concentration within the schools. We recognized this in *Swann* when we said:

> "They [school authorities] must decide questions of location and capacity in light of population growth, finances, land values, site availability, through an almost endless list of factors to be considered. The result of this will be a decision which, when combined with one technique or another of student assignment, will determine the racial composition of the student body in each school in the system. Over the long run, the consequences of the choices will be far reaching. People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
>
> "In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools

> which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy." 402 U. S., at 20–21.

In short, common sense dictates the conclusion that racially inspired school board actions have an impact beyond the particular schools that are the subjects of those actions. This is not to say, of course, that there can never be a case in which the geographical structure of, or the natural boundaries within, a school district may have the effect of dividing the district into separate, identifiable and unrelated units. Such a determination is essentially a question of fact to be resolved by the trial court in the first instance, but such cases must be rare. In the absence of such a determination, proof of state-imposed segregation in a substantial portion of the district will suffice to support a finding by the trial court of the existence of a dual system. Of course, where that finding is made, as in cases involving statutory dual systems, the school authorities have an affirmative duty "to effectuate a transition to a racially nondiscriminatory school system." *Brown II, supra,* at 301.

On remand, therefore, the District Court should decide in the first instance whether respondent School Board's deliberate racial segregation policy with respect to the Park Hill schools constitutes the entire Denver school system a dual school system. We observe that on the record now before us there is indication that Denver is not a school district which might be divided into separate, identifiable and unrelated units. The District Court stated, in its summary of findings as to the Park Hill schools, that there was "a high degree of interrelationship among these schools, so that any action by the Board affecting the racial composition of one would almost certainly have an effect on the others." 303 F. Supp., at 294. And there was cogent evidence that the ultimate effect of the Board's actions in Park Hill was not limited to that area: the three 1969 resolutions designed to desegregate the Park Hill schools changed the attendance patterns of at least 29 schools attended by almost one-third of the pupils in the Denver school system.[13] This suggests that the official segregation in Park Hill affected the racial composition of schools throughout the district.

On the other hand, although the District Court did not state this, or indeed any, reason why the Park Hill finding was disregarded when attention was turned to the core city schools—beyond saying that the Park Hill and core city areas were in its view "different"—the areas, although adjacent to each other, are separated by Colorado Boulevard, a six-lane highway. From the record, it is difficult to assess the actual significance of Colorado Boulevard to the Denver school system. The Boulevard runs the length of the school district, but at

[13] See the chart in 445 F. 2d, at 1008–1009, which indicates that 31,767 pupils attended the schools affected by the resolutions.

least two elementary schools, Teller and Steck, have attendance zones which cross the Boulevard. Moreover, the District Court, although referring to the Boulevard as "a natural dividing line," 303 F. Supp., at 282, did not feel constrained to limit its consideration of *de jure* segregation in the Park Hill area to those schools east of the Boulevard. The court found that by building Barrett Elementary School west of the Boulevard and by establishing the Boulevard as the eastern boundary of the Barrett attendance zone, the Board was able to maintain for a number of years the Anglo character of the Park Hill schools. This suggests that Colorado Boulevard is not to be regarded as the type of barrier that of itself could confine the impact of the Board's actions to an identifiable area of the school district, perhaps because a major highway is generally not such an effective buffer between adjoining areas. Cf. *Davis* v. *Board of School Commissioners of Mobile County,* 402 U. S. 33 (1971). But this is a factual question for resolution by the District Court on remand. In any event, inquiry whether the District Court and the Court of Appeals applied the correct legal standards in addressing petitioners' contention of deliberate segregation in the core city schools is not at an end even if it be true that Park Hill may be separated from the rest of the Denver school district as a separate, identifiable, and unrelated unit.

III

The District Court proceeded on the premise that the finding as to the Park Hill schools was irrelevant to the consideration of the rest of the district, and began its examination of the core city schools by requiring that petitioners prove all of the essential elements of *de jure* segregation—that is, stated simply, a current condition of segregation resulting from intentional state action

directed specifically to the core city schools.[14] The segregated character of the core city schools could not be and is not denied. Petitioners' proof showed that at the time of trial 22 of the schools in the core city area were less than 30% in Anglo enrollment and 11 of the schools were less than 10% Anglo.[15] Petitioners also introduced substantial evidence demonstrating the existence of a disproportionate racial and ethnic composition of faculty and staff at these schools.

On the question of segregative intent, petitioners presented evidence tending to show that the Board, through its actions over a period of years, intentionally created and maintained the segregated character of the core city schools. Respondents countered this evidence by arguing that the segregation in these schools is the result of a racially neutral "neighborhood school policy"

[14] Our Brother REHNQUIST argues in dissent that the District Court did take the Park Hill finding into account in addressing the question of alleged *de jure* segregation of the core city schools. *Post*, at 262. He cites the following excerpt from a footnote to the District Court's opinion of March 21, 1970, 313 F. Supp., at 74–75, n. 18: "Although past discriminatory acts may not be a substantial factor contributing to present segregation, they may nevertheless be probative on the issue of the segregative purpose of other discriminatory acts which are in fact a substantial factor in causing a present segregated situation." But our Brother REHNQUIST omits the rest of the footnote: "Thus, in part I of this opinion, we discussed the building of Barrett, boundary changes and the use of mobile units as they relate to the purpose for the rescission of Resolutions 1520, 1524 and 1531." Obviously, the District Court was carefully limiting the comment to the consideration being given past discriminatory acts *affecting the Park Hill schools* in assessing the causes of current segregation of *those schools*.

[15] In addition to these 22 schools, see 313 F. Supp., at 78, two more schools, Elyria and Smedley Elementary Schools, became less than 30% Anglo after the District Court's decision on the merits. These two schools were thus included in the list of segregated schools. 313 F. Supp., at 92.

and that the acts of which petitioners complain are explicable within the bounds of that policy. Accepting the School Board's explanation, the District Court and the Court of Appeals agreed that a finding of *de jure* segregation as to the core city schools was not permissible since petitioners had failed to prove "(1) a racially discriminatory purpose and (2) a causal relationship between the acts complained of and the racial imbalance admittedly existing in those schools." 445 F. 2d, at 1006. This assessment of petitioners' proof was clearly incorrect.

Although petitioners had already proved the existence of intentional school segregation in the Park Hill schools, this crucial finding was totally ignored when attention turned to the core city schools. Plainly, a finding of intentional segregation as to a portion of a school system is not devoid of probative value in assessing the school authorities' intent with respect to other parts of the same school system. On the contrary, where, as here, the case involves one school board, a finding of intentional segregation on its part in one portion of a school system is highly relevant to the issue of the board's intent with respect to other segregated schools in the system. This is merely an application of the well-settled evidentiary principle that "the prior doing of other similar acts, whether clearly a part of a scheme or not, is useful as reducing the possibility that the act in question was done with innocent intent." 2 J. Wigmore, Evidence 200 (3d ed. 1940). "Evidence that similar and related offenses were committed . . . tend[s] to show a consistent pattern of conduct highly relevant to the issue of intent." *Nye & Nissen* v. *United States,* 336 U. S. 613, 618 (1949). Similarly, a finding of illicit intent as to a meaningful portion of the item under consideration has substantial probative value on the question of illicit intent as to

the remainder. See, for example, the cases cited in 2 Wigmore, *supra,* at 301–302. And "[t]he foregoing principles are equally as applicable to civil cases as to criminal cases . . . ." *Id.,* at 300. See also C. McCormick, Evidence 329 (1954).

Applying these principles in the special context of school desegregation cases, we hold that a finding of intentionally segregative school board actions in a meaningful portion of a school system, as in this case, creates a presumption that other segregated schooling within the system is not adventitious. It establishes, in other words, a prima facie case of unlawful segregative design on the part of school authorities, and shifts to those authorities the burden of proving that other segregated schools within the system are not also the result of intentionally segregative actions. This is true even if it is determined that different areas of the school district should be viewed independently of each other because, even in that situation, there is high probability that where school authorities have effectuated an intentionally segregative policy in a meaningful portion of the school system, similar impermissible considerations have motivated their actions in other areas of the system. We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* [16] is *purpose* or *intent* to segregate. Where school authorities have been found to have practiced purposeful segregation in part of a school system, they may be expected to oppose system-wide desegregation, as did the respondents in this case, on the ground that their purposefully segregative actions were isolated and individual events, thus leaving plaintiffs with the burden of proving otherwise. But at that point where an intentionally segrega-

[16] 402 U. S. 1, 17–18 (1971).

tive policy is practiced in a meaningful or significant segment of a school system, as in this case, the school authorities cannot be heard to argue that plaintiffs have proved only "isolated and individual" unlawfully segregative actions. In that circumstance, it is both fair and reasonable to require that the school authorities bear the burden of showing that their actions as to other segregated schools within the system were not also motivated by segregative intent.

This burden-shifting principle is not new or novel. There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, "is merely a question of policy and fairness based on experience in the different situations." 9 J. Wigmore, Evidence § 2486, at 275 (3d ed. 1940). In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated. Thus, in *Swann*, 402 U. S., at 18, we observed that in a system with a "history of segregation," "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." Again, in a school system with a history of segregation, the discharge of a disproportionately large number of Negro teachers incident to desegregation "thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence." *Chambers* v. *Hendersonville City Board of Education*, 364 F. 2d 189, 192 (CA4 1966) (en banc). See also *United States* v. *Jefferson County Board of Education*, 372 F.

2d 836, 887–888 (CA5 1966), aff'd *en banc*, 380 F. 2d 385 (1967); *North Carolina Teachers Assn.* v. *Asheboro City Board of Education*, 393 F. 2d 736, 743 (CA4 1968) (*en banc*); *Williams* v. *Kimbrough*, 295 F. Supp. 578, 585 (WD La. 1969); *Bonner* v. *Texas City Independent School District*, 305 F. Supp. 600, 621 (SD Tex. 1969). Nor is this burden-shifting principle limited to former statutory dual systems. See, *e. g.*, *Davis* v. *School District of the City of Pontiac*, 309 F. Supp. 734, 743, 744 (ED Mich. 1970), aff'd, 443 F. 2d 573 (CA6 1971); *United States* v. *School District No. 151*, 301 F. Supp. 201, 228 (ND Ill. 1969), modified on other grounds, 432 F. 2d 1147 (CA7 1970). Indeed, to say that a system has a "history of segregation" is merely to say that a pattern of intentional segregation has been established in the past. Thus, be it a statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated, the existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts.

In discharging that burden, it is not enough, of course, that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions. The courts below attributed much significance to the fact that many of the Board's actions in the core city area antedated our decision in *Brown*. We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remote-

ness in time certainly does not make those actions any less "intentional."

This is not to say, however, that the prima facie case may not be met by evidence supporting a finding that a lesser degree of segregated schooling in the core city area would not have resulted even if the Board had not acted as it did. In *Swann,* we suggested that at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention. 402 U. S., at 31–32. See also *Hobson* v. *Hansen,* 269 F. Supp. 401, 495 (DC 1967), aff'd *sub nom. Smuck* v. *Hobson,* 132 U. S. App. D. C. 372, 408 F. 2d 175 (1969).[17] We made it clear, however, that a connection between past segregative acts and present segregation may be present even when not apparent and that close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation. Thus, if respondent School Board cannot disprove segregative intent, it can rebut the prima facie case only by showing that its past segregative acts did not create or contribute to the current segregated condition of the core city schools.

The respondent School Board invoked at trial its "neighborhood school policy" as explaining racial and ethnic concentrations within the core city schools, arguing

[17] It may be that the District Court and Court of Appeals were applying this test in holding that petitioners had failed to prove that the Board's actions "caused" the current condition of segregation in the core city schools. But, if so, certainly plaintiffs in a school desegregation case are not required to prove "cause" in the sense of "non-attenuation." That is a factor which becomes relevant only after past intentional actions resulting in segregation have been established. At that stage, the burden becomes the school authorities' to show that the current segregation is in no way the result of those past segregative actions.

that since the core city area population had long been Negro and Hispano, the concentrations were necessarily the result of residential patterns and not of purposefully segregative policies. We have no occasion to consider in this case whether a "neighborhood school policy" of itself will justify racial or ethnic concentrations in the absence of a finding that school authorities have committed acts constituting *de jure* segregation. It is enough that we hold that the mere assertion of such a policy is not dispositive where, as in this case, the school authorities have been found to have practiced *de jure* segregation in a meaningful portion of the school system by techniques that indicate that the "neighborhood school" concept has not been maintained free of manipulation. Our observations in *Swann, supra,* at 28, are particularly instructive on this score:

> "Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. . . .
>
> ". . . 'Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation resulting from discriminatory location of school sites or distortion of school size in order to achieve or maintain an artificial racial separation. When school authorities present a district court with a 'loaded game board,' affirmative action in the form of remedial altering of attendance zones is proper to achieve truly nondiscriminatory assignments. In short, an assignment plan is not acceptable simply because it appears to be neutral."

Thus, respondent School Board having been found to have practiced deliberate racial segregation in schools attended by over one-third of the Negro school population, that crucial finding establishes a prima facie case of intentional segregation in the core city schools. In such case, respondent's neighborhood school policy is not to be determinative "simply because it appears to be neutral."

IV

In summary, the District Court on remand, *first,* will afford respondent School Board the opportunity to prove its contention that the Park Hill area is a separate, identifiable and unrelated section of the school district that should be treated as isolated from the rest of the district. If respondent School Board fails to prove that contention, the District Court, *second,* will determine whether respondent School Board's conduct over almost a decade after 1960 in carrying out a policy of deliberate racial segregation in the Park Hill schools constitutes the entire school system a dual school system. If the District Court determines that the Denver school system is a dual school system, respondent School Board has the affirmative duty to desegregate the entire system "root and branch." *Green* v. *County School Board,* 391 U. S., at 438. If the District Court determines, however, that the Denver school system is not a dual school system by reason of the Board's actions in Park Hill, the court, *third,* will afford respondent School Board the opportunity to rebut petitioners' prima facie case of intentional segregation in the core city schools raised by the finding of intentional segregation in the Park Hill schools. There, the Board's burden is to show that its policies and practices with respect to schoolsite location, school size, school renovations and additions, student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, as-

signment of faculty and staff, etc., considered together and premised on the Board's so-called "neighborhood school" concept, either were not taken in effectuation of a policy to create or maintain segregation in the core city schools, or, if unsuccessful in that effort, were not factors in causing the existing condition of segregation in these schools. Considerations of "fairness" and "policy" demand no less in light of the Board's intentionally segregative actions. If respondent Board fails to rebut petitioners' prima facie case, the District Court must, as in the case of Park Hill, decree all-out desegregation of the core city schools.

The judgment of the Court of Appeals is modified to vacate instead of reverse the parts of the Final Decree that concern the core city schools, and the case is remanded to the District Court for further proceedings consistent with this opinion.[18]

It is so ordered.

[Map of elementary school boundaries follows this page.]

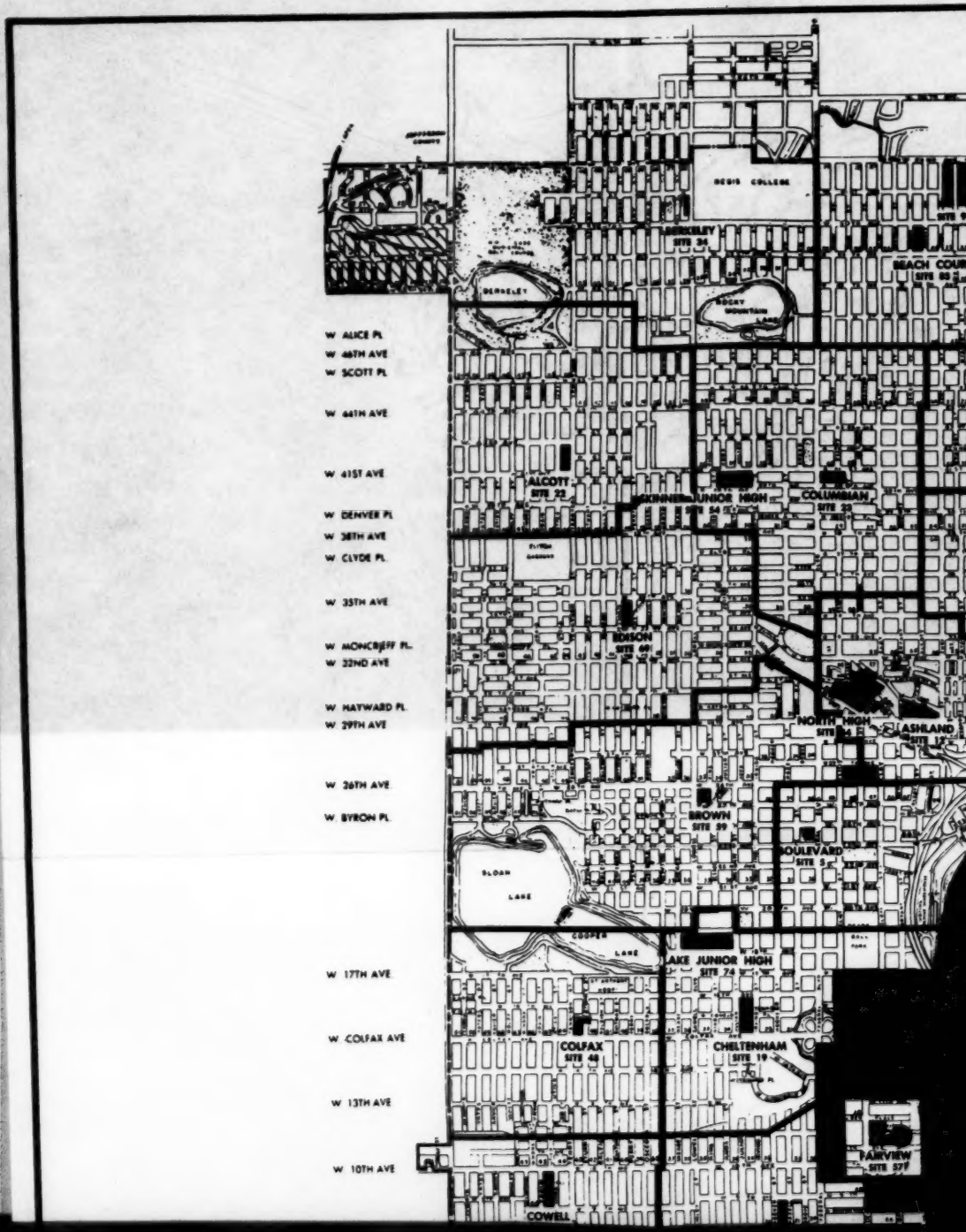
MR. CHIEF JUSTICE BURGER concurs in the result.

MR. JUSTICE WHITE took no part in the decision of this case.

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, I agree with my Brother POWELL that there is, for the purposes of the

[18] We therefore do not reach, and intimate no view upon, the merits of the holding of the District Court, premised upon its erroneous finding that the situation "is more like *de facto* segregation," 313 F. Supp., at 73, that nevertheless, although all-out desegregation "could not be decreed . . . the only feasible and constitutionally acceptable program . . . is a system of desegregation and integration which provides compensatory education in an integrated environment." *Id.*, at 96.



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W MONCRIEFF PL
W 32ND AVE
W HAYWARD PL
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W 26TH AVE
W BYRON PL
W 17TH AVE
W COLFAX AVE
W 13TH AVE
W 10TH AVE
DEGIS COLLEGE
BERKELEY
SITE 34
BEACH COUR
SITE 83
BERKELEY
ROCKY MOUNTAIN LANE
ALCOTT
SITE 22
SKINNER JUNIOR HIGH
SITE 54
COLUMBIAN
SITE 23
EDISON
SITE 69
NORTH HIGH
ASHLAND
BROWN
SITE 59
BOULEVARD
SITE 5
SLOAN LAKE
COOPER LAKE
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COLFAX
SITE 48
CHELTENHAM
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FAIRVIEW
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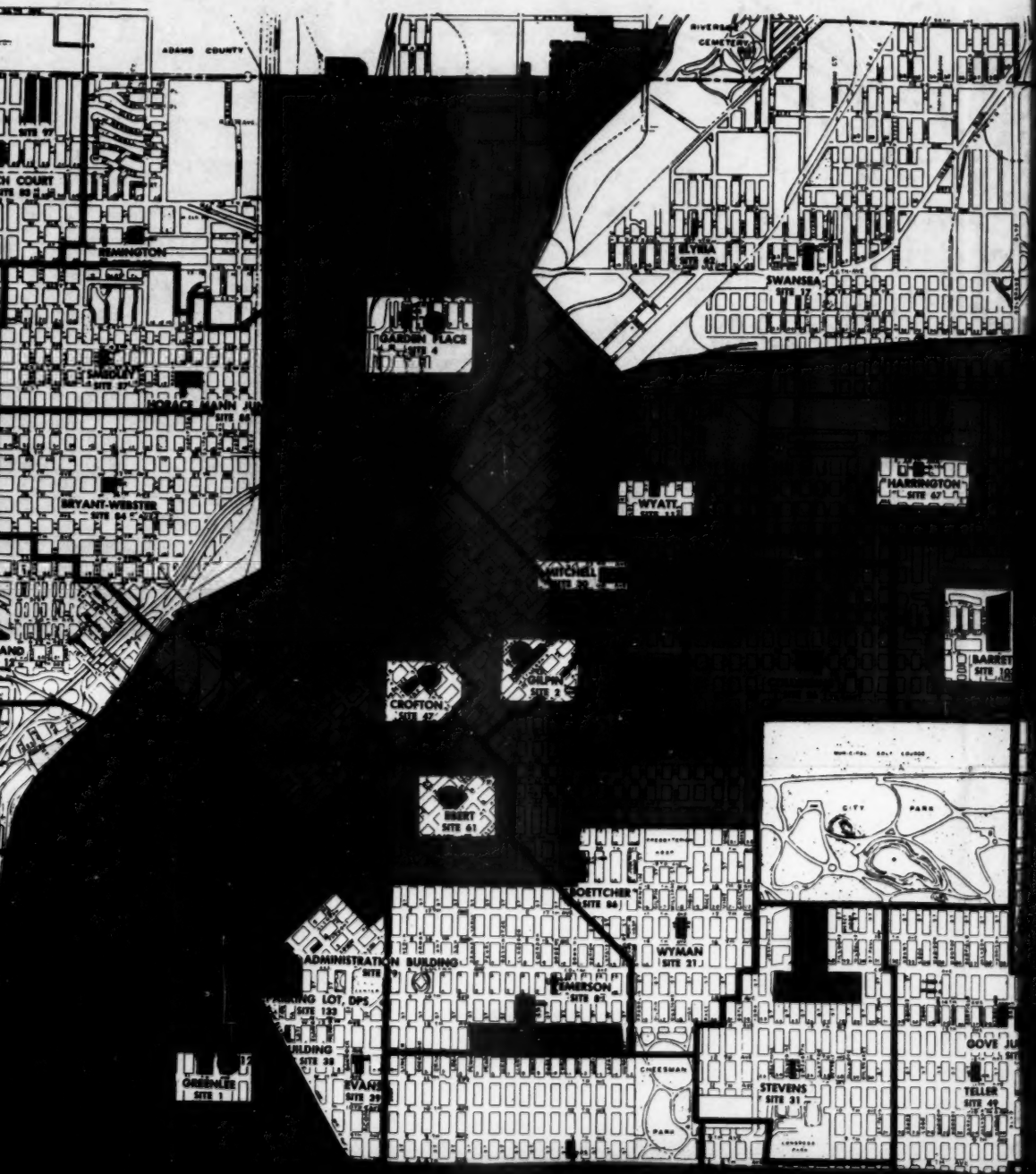
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REMINGTON
SWANSEA
GARDEN PLACE
SHERIDAN
HORACE MANN
BRYANT-WEBSTER
WYATT
HARRINGTON
MITCHELL
CROFTON
GILPIN
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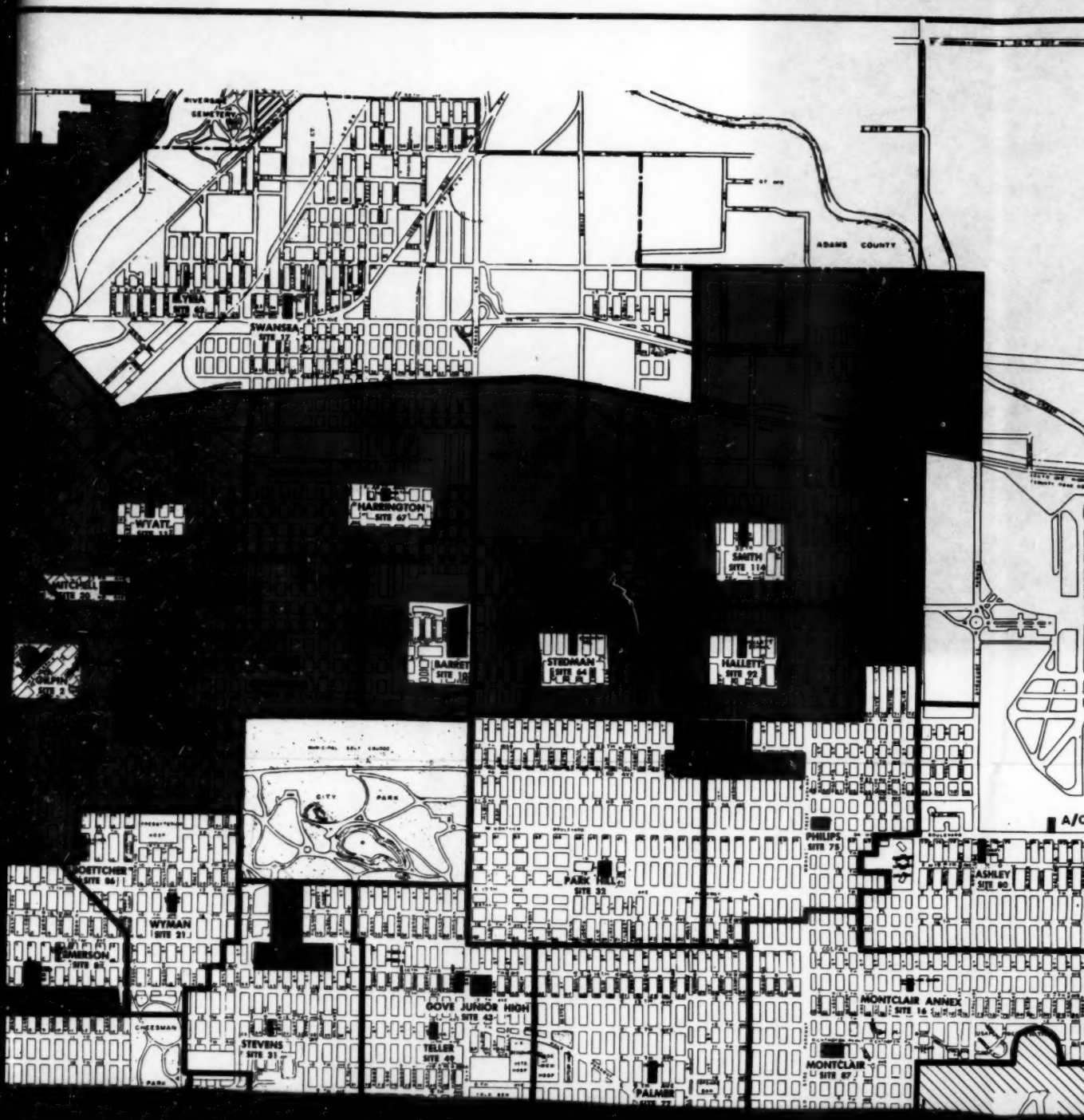
ADMINISTRATION BUILDING
WYMAN
EMERSON
STEVENS
TELLER
GREENLEE
CHEESMAN PARK



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ADAMS COUNTY
SWANSEA
SITE 17
HARRINGTON
SITE 67
WYATT
SMITH
SITE 114
MITCHELL
BARRETT
STEDMAN
SITE 64
HALLETT
SITE 92
GILPIN
SITE 2
CITY PARK
PHILIPS
SITE 75
ASHLEY
SITE 80
PARK HILL
SITE 32
WYMAN
SITE 21
EMERSON
GOVE JUNIOR HIGH
SITE 43
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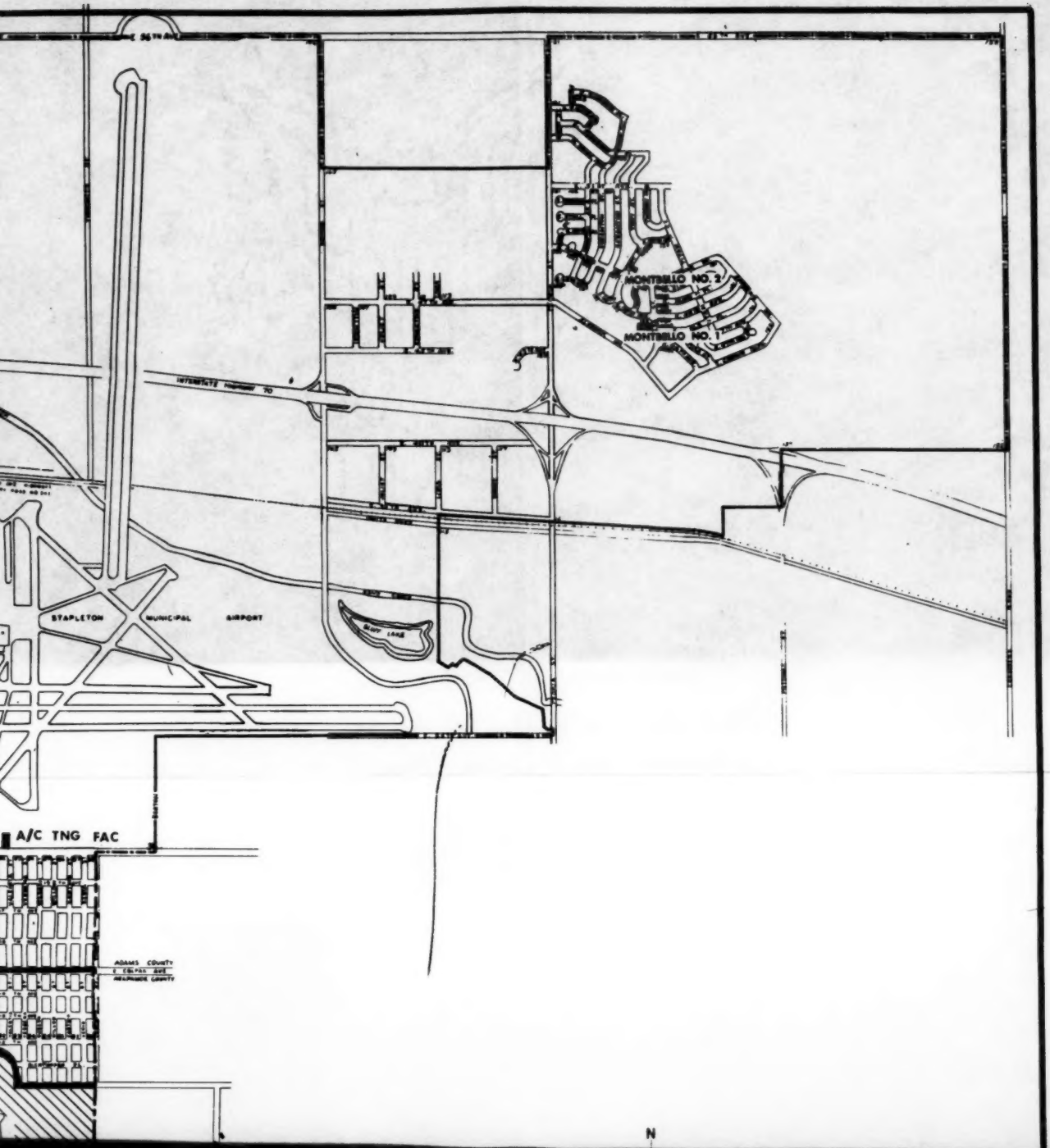
SITE 16
CHEESMAN
STEVENS
SITE 31
TELLER
SITE 49
MONTCLAIR
SITE 87
PALMER


MONTBELLO NO. 2
MONTBELLO NO. 1
INTERSTATE HIGHWAY 70
STAPLETON MUNICIPAL AIRPORT
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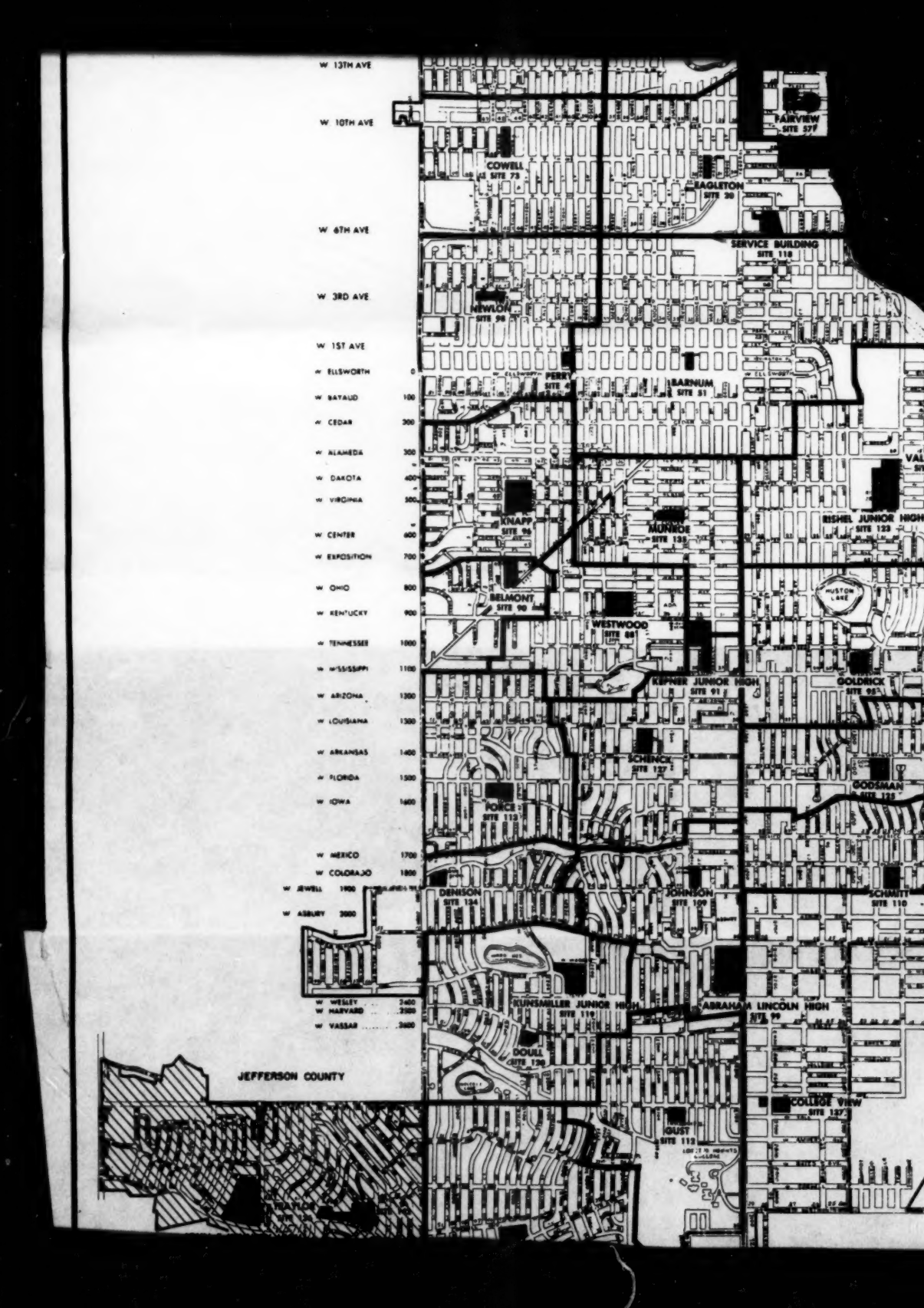
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NEWLON SITE 59
PERRY SITE 4
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KNAPP SITE 96
MUNROE SITE 138
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GODSMAN SITE 125
PORTER SITE 113
DENISON SITE 124
JOHNSON SITE 109
SCHMITT SITE 110
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ABRAHAM LINCOLN HIGH SITE 99
DOULL SITE 120
JEFFERSON COUNTY
COLLEGE VIEW SITE 137
GUST SITE 112

GREENLEE SITE 1
ELMWOOD SITE 9
FAIRMONT SITE 63
EVANS SITE 29
MOORE SITE 14
CHEESMAN PARK
STEVENS SITE 31
GOVE JUNIOR HIGH SITE 43
TELLER SITE 49
STECK SITE 82
BROMWELL SITE 40
DENVER COUNTRY CLUB
ELLSWORTH SITE 81
VALVERDE SITE 56
ALAMEDA SITE 33
BYERS JUNIOR HIGH SITE 52
STEELE SITE 45
LINCOLN SITE 15
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SOUTH HIGH SITE 71
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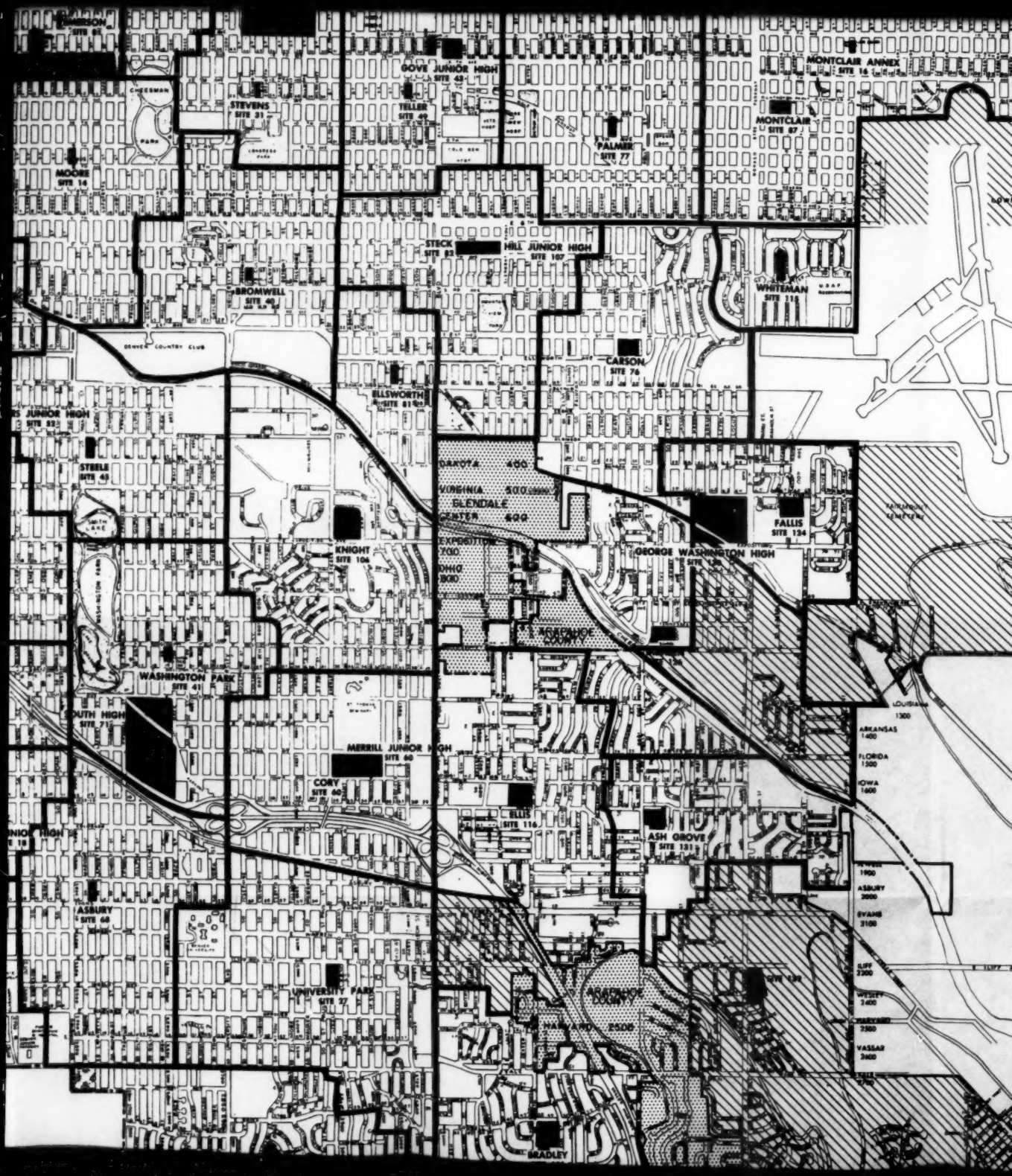
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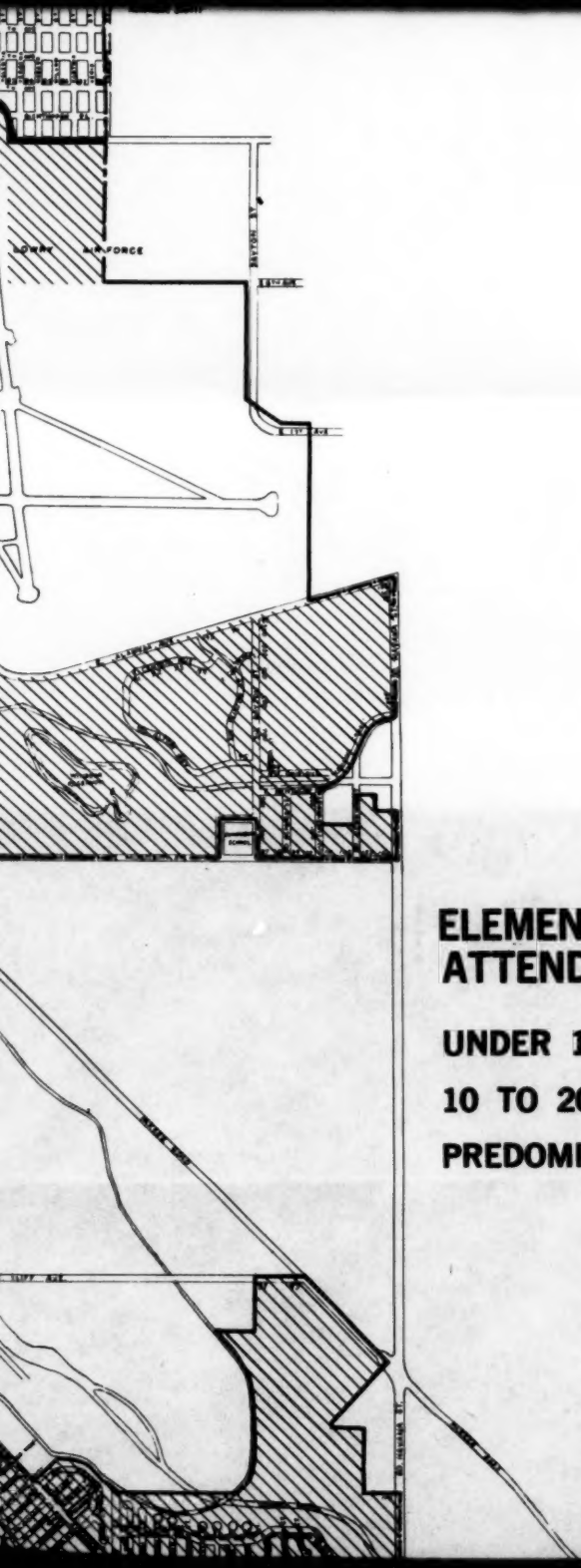

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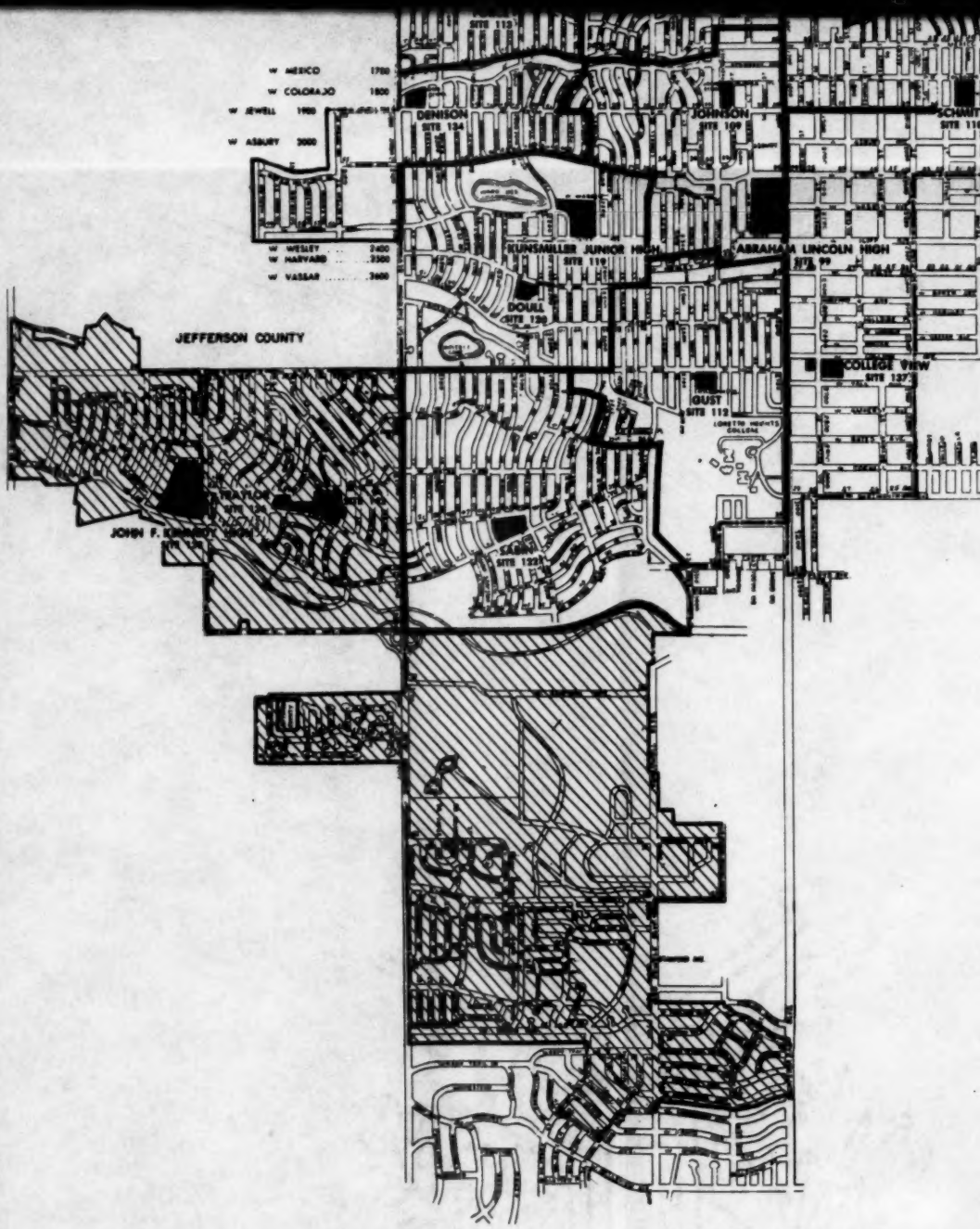
ELEMENTARY SCHOOL ATTENDANCE AREAS

UNDER 10 PERCENT ANGLO

10 TO 20 PERCENT ANGLO

PREDOMINANTLY HISPANO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DOUGLAS SITE 130
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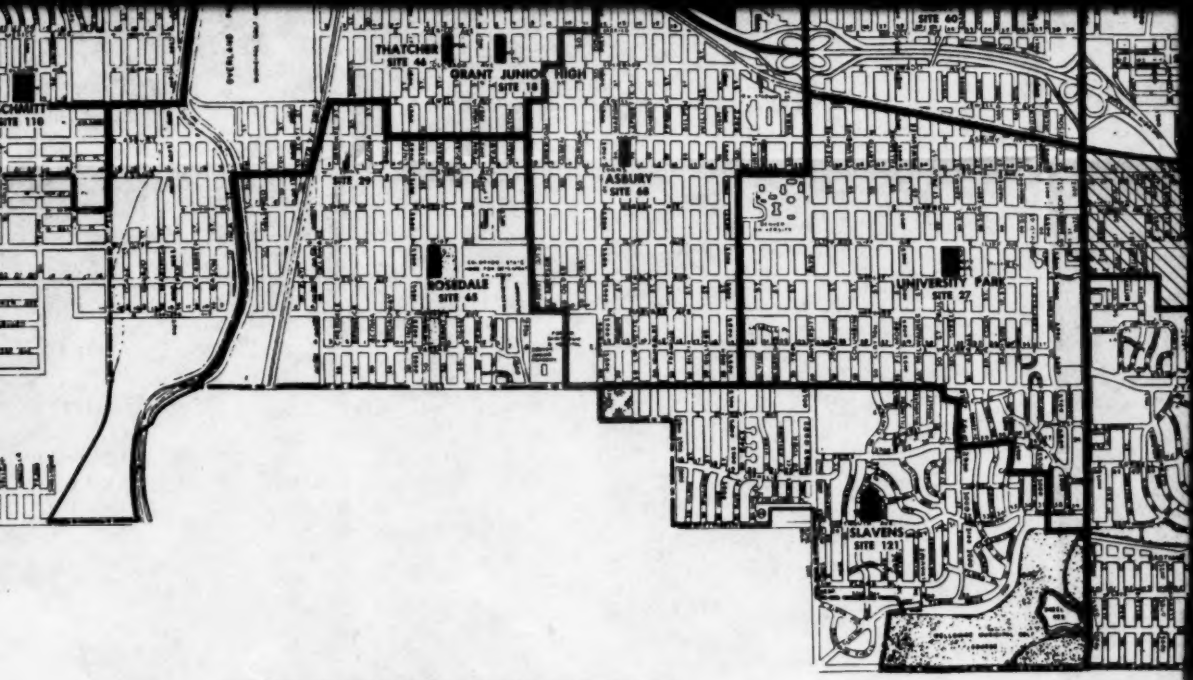
SABIN SITE 122
JOHN F. KENNEDY JUNIOR HIGH SITE 126



SCHOOL DISTRICT NO. 1

IN THE CITY AND COUNTY OF DENVER
AND STATE OF COLORADO

ELEMENTARY SCHOOL BOUNDARIES

SEPTEMBER, 1967

SCALE: 2.7 INCHES=1 MILE

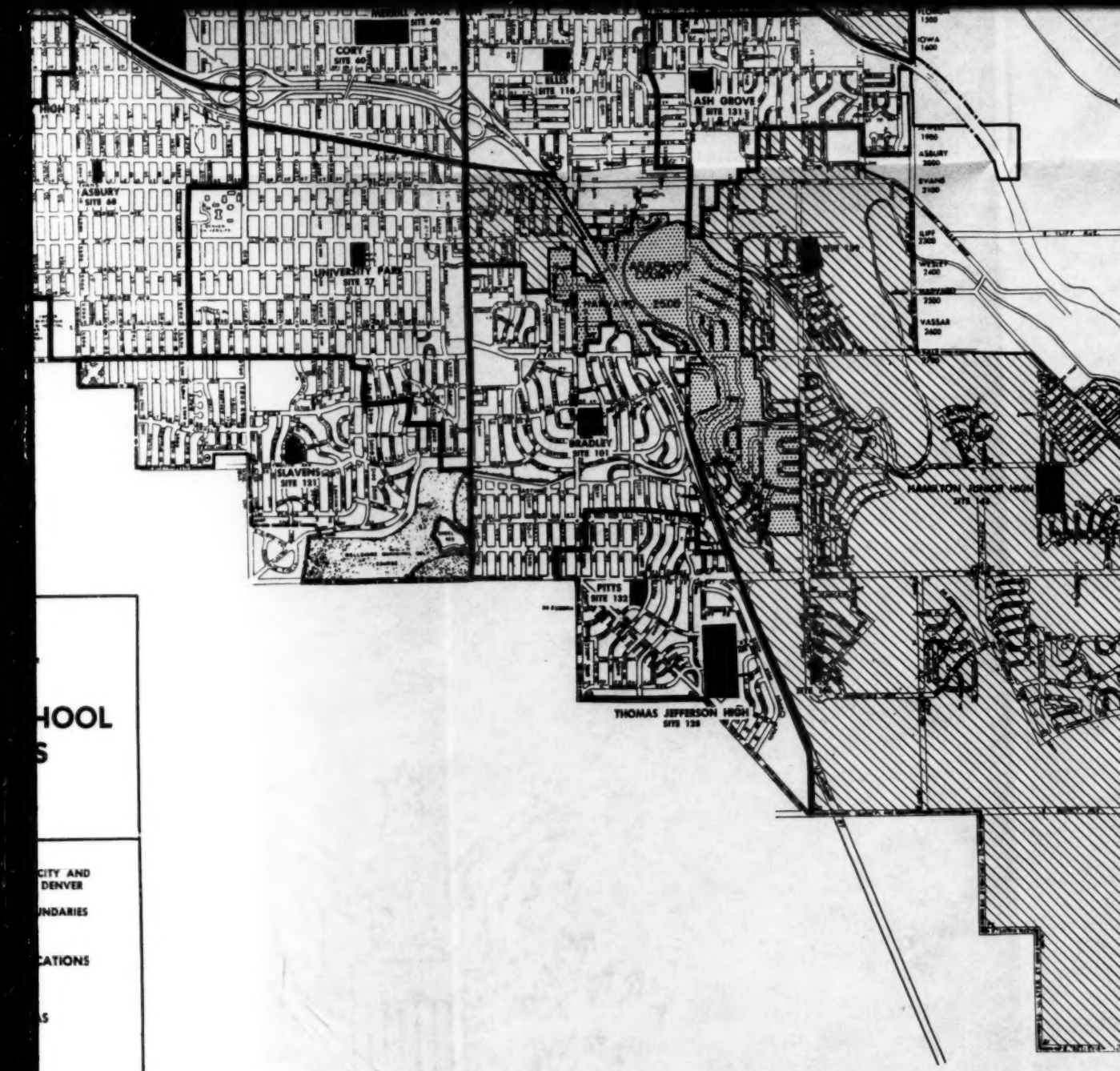
BOUNDARY CITY AND COUNTY OF DENVER

SCHOOL BOUNDARIES

BUILDING AND SITE LOCATIONS

SPECIAL ASSIGNED AREAS

APPROVED: Howard L. Johnson



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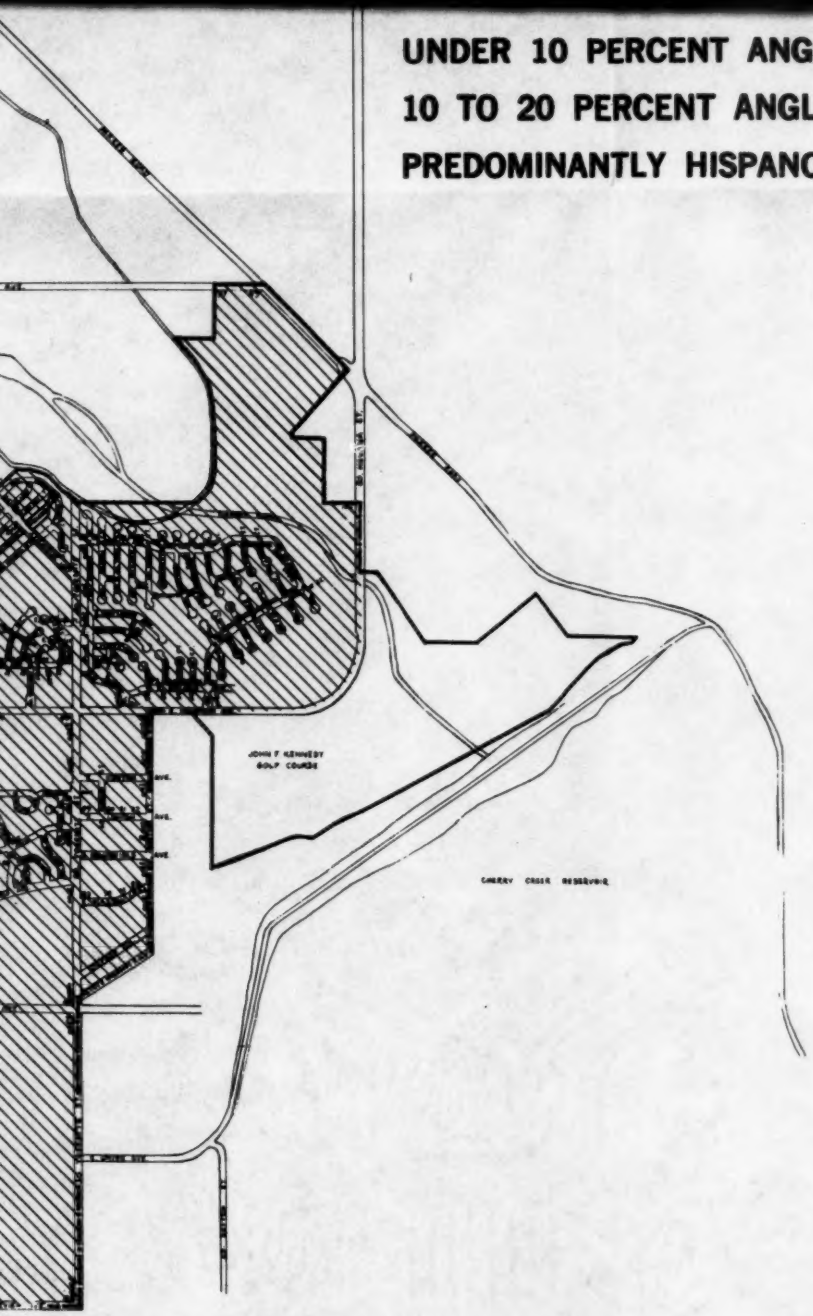
UNDER 10 PERCENT ANGLO
10 TO 20 PERCENT ANGLO
PREDOMINANTLY HISPANO
JOHN F KENNEDY GOLF COURSE
CHERRY CREEK RESERVOIR

Equal Protection Clause of the Fourteenth Amendment as applied to the school cases, no difference between *de facto* and *de jure* segregation. The school board is a state agency and the lines that it draws, the locations it selects for school sites, the allocation it makes of students, the budgets it prepares are state action for Fourteenth Amendment purposes.

As Judge Wisdom cogently stated in *United States* v. *Texas Education Agency*, 467 F. 2d 848, segregated schools are often created, not by dual school systems decreed by the legislature, but by the administration of school districts by school boards. Each is state action within the meaning of the Fourteenth Amendment. "Here school authorities assigned students, faculty, and professional staff; employed faculty and staff; chose sites for schools; constructed new schools and renovated old ones; and drew attendance zone lines. The natural and foreseeable consequence of these actions was segregation of Mexican-Americans. Affirmative action to the contrary would have resulted in desegregation. When school authorities, by their actions, contribute to segregation in education, whether by causing additional segregation or maintaining existing segregation, they deny to the students equal protection of the laws.

"We need not define the quantity of state participation which is a prerequisite to a finding of constitutional violation. Like the legal concepts of 'the reasonable man,' 'due care,' 'causation,' 'preponderance of the evidence,' and 'beyond a reasonable doubt,' the necessary degree of state involvement is incapable of precise definition and must be defined on a case-by-case basis. Suffice it to say that school authorities here played a significant role in causing or perpetuating unequal educational opportunities for Mexican-Americans, and did so on a system-wide basis." *Id.*, at 863–864.

These latter acts are often said to create *de facto* as contrasted with *de jure* segregation. But, as Judge Wisdom observes, each is but another form of *de jure* segregation.

I think it is time to state that there is no constitutional difference between *de jure* and *de facto* segregation, for each is the product of state actions or policies. If a "neighborhood" or "geographical" unit has been created along racial lines by reason of the play of restrictive covenants that restrict certain areas to "the elite," leaving the "undesirables" to move elsewhere, there is state action in the constitutional sense because the force of law is placed behind those covenants.

There is state action in the constitutional sense when public funds are dispersed by urban development agencies to build racial ghettoes.

Where the school district is racially mixed and the races are segregated in separate schools, where black teachers are assigned almost exclusively to black schools, where the school board closed existing schools located in fringe areas and built new schools in black areas and in distant white areas, where the school board continued the "neighborhood" school policy at the elementary level, these actions constitute state action. They are of a kind quite distinct from the classical *de jure* type of school segregation. Yet calling them *de facto* is a misnomer, as they are only more subtle types of state action that create or maintain a wholly or partially segregated school system. See *Kelly* v. *Guinn*, 456 F. 2d 100.

When a State forces, aids, or abets, or helps create a racial "neighborhood," it is a travesty of justice to treat that neighborhood as sacrosanct in the sense that its creation is free from the taint of state action.

The Constitution and Bill of Rights have described the design of a pluralistic society. The individual has the

right to seek such companions as he desires. But a State is barred from creating by one device or another ghettoes that determine the school one is compelled to attend.

MR. JUSTICE POWELL concurring in part and dissenting in part.

I concur in the remand of this case for further proceedings in the District Court, but on grounds that differ from those relied upon by the Court.

This is the first school desegregation case to reach this Court which involves a major city outside the South. It comes from Denver, Colorado, a city and a State which have not operated public schools under constitutional or statutory provisions which mandated or permitted racial segregation.[1] Nor has it been argued that any other legislative actions (such as zoning and housing laws) contributed to the segregation which is at issue.[2] The Court has inquired only to what extent the Denver public school authorities may have contributed to the school segregation which is acknowledged to exist in Denver.

The predominantly minority schools are located in two areas of the city referred to as Park Hill and the core city area. The District Court considered that a school

[1] Article IX, § 8, of the Colorado Constitution has expressly prohibited any "classification of pupils . . . on account of race or color."

[2] See, *e. g., Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 23 (1971):

"We do not reach . . . the question whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by the school authorities, is a constitutional violation requiring remedial action by a school desegregation decree." The term "state action," as used herein, thus refers to actions of the appropriate public school authorities.

with a concentration of 70% to 75% "Negro or Hispano students" was identifiable as a segregated school. 313 F. Supp. 61, 77. Wherever one may draw this line, it is undisputed that most of the schools in these two areas are in fact heavily segregated in the sense that their student bodies are overwhelmingly composed of non-Anglo children. The city-wide school mix in Denver is 66% Anglo, 14% Negro, and 20% Hispano. In areas of the city where the Anglo population largely resides, the schools are predominantly Anglo, if not entirely so.

The situation in Denver is generally comparable to that in other large cities across the country in which there is a substantial minority population and where desegregation has not been ordered by the federal courts. There is segregation in the schools of many of these cities fully as pervasive as that in southern cities prior to the desegregation decrees of the past decade and a half. The focus of the school desegregation problem has now shifted from the South to the country as a whole. Unwilling and footdragging as the process was in most places, substantial progress toward achieving integration has been made in Southern States.[3] No comparable progress has been made in many nonsouthern cities with large minority populations[4] primarily because of the *de facto/de jure*

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[3] According to the 1971 Department of Health, Education, and Welfare (HEW) estimate, 43.9% of Negro pupils attended majority white schools in the South as opposed to only 27.8% who attended such schools in the North and West. Fifty-seven percent of all Negro pupils in the North and West attend schools with over 80% minority population as opposed to 32.2% who do so in the South. 118 Cong. Rec. 564 (1972).

[4] The 1971 HEW Enrollment Survey dramatized the segregated character of public school systems in many nonsouthern cities. The percentage of Negro pupils which attended schools more than 80% black was 91.3 in Cleveland, Ohio; 97.8 in Compton, California; 78.1 in Dayton, Ohio; 78.6 in Detroit, Michigan; 95.7 in Gary,

distinction nurtured by the courts and accepted complacently by many of the same voices which denounced the evils of segregated schools in the South.[5] But if our national concern is for those who attend such schools, rather than for perpetuating a legalism rooted in history rather than present reality, we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta.

I

In my view we should abandon a distinction which long since has outlived its time, and formulate constitutional principles of national rather than merely regional application. When *Brown* v. *Board of Education,* 347 U. S. 483 (1954) (*Brown I*), was decided, the distinction between

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Indiana; 86.4 in Kansas City, Missouri; 86.6 in Los Angeles, California; 78.8 in Milwaukee, Wisconsin; 91.3 in Newark, New Jersey; 89.8 in St. Louis, Missouri. The full data from the Enrollment Survey may be found in 118 Cong. Rec. 563–566 (1972).

[5] As Senator Ribicoff recognized:

"For years we have fought the battle of integration primarily in the South where the problem was severe. It was a long, arduous fight that deserved to be fought and needed to be won.

"Unfortunately, as the problem of racial isolation has moved north of the Mason-Dixon line, many northerners have bid an evasive farewell to the 100-year struggle for racial equality. Our motto seems to have been 'Do to southerners what you do not want to do to yourself.'

"Good reasons have always been offered, of course, for not moving vigorously ahead in the North as well as the South.

"First, it was that the problem was worse in the South. Then the facts began to show that that was no longer true.

"We then began to hear the de facto-de jure refrain.

"Somehow residential segregation in the North was accidental or de facto and that made it better than the legally supported de jure segregation of the South. It was a hard distinction for black children in totally segregated schools in the North to understand, but it allowed us to avoid the problem." 118 Cong. Rec. 5455 (1972).

de jure and *de facto* segregation was consistent with the limited constitutional rationale of that case. The situation confronting the Court, largely confined to the Southern States, was officially imposed racial segregation in the schools extending back for many years and usually embodied in constitutional and statutory provisions.

The great contribution of *Brown I* was its holding in unmistakable terms that the Fourteenth Amendment forbids state-compelled or state-authorized segregation of public schools. 347 U. S., at 488, 493–495. Although some of the language was more expansive, the holding in *Brown I* was essentially negative: It was impermissible under the Constitution for the States, or their instrumentalities, to force children to attend segregated schools. The forbidden action was *de jure*, and the opinion in *Brown I* was construed—for some years and by many courts—as requiring only state neutrality, allowing "freedom of choice" as to schools to be attended so long as the State itself assured that the choice was genuinely free of official restraint.[6]

But the doctrine of *Brown I*, as amplified by *Brown II*, 349 U. S. 294 (1955), did not retain its original meaning. In a series of decisions extending from 1954 to 1971 the

[6] See, *e. g.*, *Bradley* v. *School Board*, 345 F. 2d 310, 316 (CA4 1965) (en banc):

"It has been held again and again . . . that the Fourteenth Amendment prohibition is not against segregation as such. . . . A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend." The case was later vacated and remanded by this Court, which expressed no view on the merits of the desegregation plans submitted. 382 U. S. 103, 105 (1965). See also *Bell* v. *School City of Gary, Ind.*, 324 F. 2d 209 (CA7 1963); *Downs* v. *Board of Education*, 336 F. 2d 988 (CA10 1964); *Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55 (CA6 1966).

concept of state neutrality was transformed into the present constitutional doctrine requiring affirmative state action to desegregate school systems.[7] The keystone case was *Green* v. *County School Board,* 391 U. S. 430, 437–438 (1968), where school boards were declared to have "the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." The school system before the Court in *Green* was operating in a rural and sparsely settled county where there were no concentrations of white and black populations, no neighborhood school system (there were only two schools in the county), and none of the problems of an urbanized school district.[8] The Court properly identified the freedom-of-choice program there as a subterfuge, and the language in *Green* imposing an affirmative duty to convert to a unitary system was appropriate on the facts before the Court. There was, however, reason to question to what extent this duty would apply in the vastly different factual setting of a large city with extensive areas of residential segregation, presenting problems and calling for solutions quite different from those in the rural setting of New Kent County, Virginia.

But the doubt as to whether the affirmative-duty concept would flower into a new constitutional principle of general application was laid to rest by *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), in which the duty articulated in *Green* was applied to the

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[7] For a concise history and commentary on the evolution, see generally A. Bickel, The Supreme Court and the Idea of Progress 126–130 (1970).

[8] See also the companion cases in *Raney* v. *Board of Education,* 391 U. S. 443 (1968), and *Monroe* v. *Board of Commissioners,* 391 U. S. 450 (1968), neither of which involved large urban or metropolitan areas.

urban school system of metropolitan Charlotte, North Carolina. In describing the residential patterns in Charlotte, the Court noted the "familiar phenomenon" in the metropolitan areas of minority groups being "concentrated in one part of the city," 402 U. S., at 25, and acknowledged that:

> "Rural areas accustomed for half a century to the consolidated school systems implemented by bus transportation could make adjustments more readily than metropolitan areas with dense and shifting population, numerous schools, congested and complex traffic patterns." 402 U. S., at 14.

Despite this recognition of a fundamentally different problem from that involved in *Green*, the Court nevertheless held that the affirmative-duty rule of *Green* was applicable, and prescribed for a metropolitan school system with 107 schools and some 84,000 pupils essentially the same remedy—elimination of segregation "root and branch"—which had been formulated for the two schools and 1,300 pupils of New Kent County.

In *Swann*, the Court further noted it was concerned only with States having "a long history" of officially imposed segregation and the duty of school authorities in those States to implement *Brown I*. 402 U. S., at 5–6. In so doing, the Court refrained from even considering whether the evolution of constitutional doctrine from *Brown I* to *Green/Swann* undercut whatever logic once supported the *de facto/de jure* distinction. In imposing on metropolitan southern school districts an affirmative duty, entailing large-scale transportation of pupils, to eliminate segregation in the schools, the Court required these districts to alleviate conditions which in large part did *not* result from historic, state-imposed *de jure* segregation. Rather, the familiar root cause of segregated schools in *all* the biracial metropolitan areas of our country is essen-

tially the same: one of segregated residential and migratory patterns the impact of which on the racial composition of the schools was often perpetuated and rarely ameliorated by action of public school authorities. This is a national, not a southern, phenomenon. And it is largely unrelated to whether a particular State had or did not have segregative school laws.[9]

Whereas *Brown I* rightly decreed the elimination of state-imposed segregation in that particular section of the country where it did exist, *Swann* imposed obligations on southern school districts to eliminate conditions which are not regionally unique but are similar both in origin and effect to conditions in the rest of the country. As the remedial obligations of *Swann* extend far beyond the elimination of the outgrowths of the state-imposed segregation outlawed in *Brown*, the rationale of *Swann* points inevitably toward a uniform, constitutional approach to our national problem of school segregation.

II

The Court's decision today, while adhering to the *de jure/de facto* distinction, will require the application

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[9] As Dr. Karl Taeuber states in his article, Residential Segregation, 213 Scientific American 12, 14 (Aug. 1965):

"No elaborate analysis is necessary to conclude from these figures that a high degree of residential segregation based on race is a universal characteristic of American cities. This segregation is found in the cities of the North and West as well as of the South; in large cities as well as small; in nonindustrial cities as well as industrial; in cities with hundreds of thousands of Negro residents as well as those with only a few thousand, and in cities that are progressive in their employment practices and civil rights policies as well as those that are not."

In his book, Negroes in Cities (1965), Dr. Taeuber stated that residential segregation exists "regardless of the character of local laws and policies, and regardless of the extent of other forms of segregation or discrimination." *Id.*, at 36.

of the *Green/Swann* doctrine of "affirmative duty" to the Denver School Board despite the absence of any history of state-mandated school segregation. The only evidence of a constitutional violation was found in various decisions of the School Board. I concur in the Court's position that the public school authorities are the responsible agency of the State, and that if the affirmative-duty doctrine is sound constitutional law for Charlotte, it is equally so for Denver. I would not, however, perpetuate the *de jure/de facto* distinction nor would I leave to petitioners the initial tortuous effort of identifying "segregative acts" and deducing "segregative intent." I would hold, quite simply, that where segregated public schools exist within a school district to a substantial degree, there is a prima facie case that the duly constituted public authorities (I will usually refer to them collectively as the "school board") are sufficiently responsible [10] to warrant imposing upon them a nationally applicable burden to demonstrate they nevertheless are operating a genuinely integrated school system.

A

The principal reason for abandonment of the *de jure/de facto* distinction is that, in view of the evolution of the holding in *Brown I* into the affirmative-duty doctrine, the distinction no longer can be justified on a principled basis. In decreeing remedial requirements for the Charlotte/Mecklenburg school district, *Swann* dealt with a metropolitan, urbanized area in which the basic

[10] A prima facie case of constitutional violation exists when segregation is found to a substantial degree in the schools of a particular district. It is recognized, of course, that this term is relative and provides no precise standards. But circumstances, demographic and otherwise, vary from district to district and hard-and-fast rules should not be formulated. The existence of a substantial percentage of schools populated by students from one race only or predominantly so populated, should trigger the inquiry.

causes of segregation were generally similar to those in all sections of the country, and also largely irrelevant to the existence of historic, state-imposed segregation at the time of the *Brown* decision. Further, the extension of the affirmative-duty concept to include compulsory student transportation went well beyond the mere remedying of that portion of school segregation for which former state segregation laws were ever responsible. Moreover, as the Court's opinion today abundantly demonstrates, the facts deemed necessary to establish *de jure* discrimination present problems of subjective intent which the courts cannot fairly resolve.

At the outset, one must try to identify the constitutional right which is being enforced. This is not easy, as the precedents have been far from explicit. In *Brown I*, after emphasizing the importance of education, the Court said that:

> "Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." 347 U. S., at 493.

In *Brown II*, the Court identified the "fundamental principle" enunciated in *Brown I* as being the unconstitutionality of "racial discrimination in public education," 349 U. S., at 298, and spoke of "the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." 349 U. S., at 300. Although this and similar language is ambiguous as to the specific constitutional right, it means—as a minimum—that one has the right not to be compelled by state action to attend a segregated school system. In the evolutionary process since 1954, decisions of this Court have added a significant gloss to this original right. Although nowhere expressly articulated in these terms, I would now define it as the right, derived from the Equal Protection Clause, to expect that once the State has as-

sumed responsibility for education, local school boards will operate *integrated school systems* within their respective districts.[11] This means that school authorities, consistent with the generally accepted educational goal of attaining quality education for all pupils, must make and implement their customary decisions with a view toward enhancing integrated school opportunities.

The term "integrated school system" presupposes, of course, a total absence of any laws, regulations, or policies supportive of the type of "legalized" segregation condemned in *Brown*. A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instruction, and curriculum opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; and (iv) locate new schools, close old ones, and determine the size and grade categories with this same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind.

The foregoing prescription is not intended to be either definitive or all-inclusive, but rather an indication of the contour characteristics of an *integrated school system* in which all citizens and pupils may justifiably be confident that racial discrimination is neither practiced nor tolerated. An integrated school system does not

[11] See discussion in Part III, *infra*, of the remedial action which is appropriate to accomplish *desegregation* where a court finds that a school board has failed to operate an *integrated school system* within its district. Plaintiffs must, however, establish the failure of a school board to operate an integrated school system before a court may order desegregative steps by way of remedy. These are two distinct steps which recognize the necessity of proving the constitutional violation before desegregative remedial action can be ordered.

mean—and indeed could not mean in view of the residential patterns of most of our major metropolitan areas—that *every school* must in fact be an integrated unit. A school which happens to be all or predominantly white or all or predominantly black is not a "segregated" school in an unconstitutional sense if the system itself is a genuinely integrated one.

Having school boards operate an integrated school system provides the best assurance of meeting the constitutional requirement that racial discrimination, subtle or otherwise, will find no place in the decisions of public school officials. Courts judging past school board actions with a view to their *general integrative effect* will be best able to assure an absence of such discrimination while avoiding the murky, subjective judgments inherent in the Court's search for "segregative intent." Any test resting on so nebulous and elusive an element as a school board's segregative "intent" provides inadequate assurance that minority children will not be short-changed in the decisions of those entrusted with the non-discriminatory operation of our public schools.

Public schools are creatures of the State, and whether the segregation is state-created or state-assisted or merely state-perpetuated should be irrelevant to constitutional principle. The school board exercises pervasive and continuing responsibility over the long-range planning as well as the daily operations of the public school system. It sets policies on attendance zones, faculty employment and assignments, school construction, closings and consolidations, and myriad other matters. School board decisions obviously are not the sole cause of segregated school conditions. But if, after such detailed and complete public supervision, substantial school segregation still persists, the presumption is strong that the school board, by its acts or omissions, is in some part responsible. Where state action and supervision are so

pervasive and where, after years of such action, segregated schools continue to exist within the district to a substantial degree, this Court is justified in finding a prima facie case of a constitutional violation. The burden then must fall on the school board to demonstrate it is operating an "integrated school system."

It makes little sense to find prima facie violations and the consequent affirmative duty to desegregate solely in those States with state-imposed segregation at the time of the *Brown* decision. The history of state-imposed segregation is more widespread in our country than the *de jure/de facto* distinction has traditionally cared to recognize.[12] As one commentator has noted:

> "[T]he three court of appeals decisions denying a constitutional duty to abolish de facto segregation all arose in cities—Cincinnati, Gary, and Kansas City, Kansas—where racial segregation in schools was formerly mandated by state or local law. [*Deal* v. *Cincinnati Board of Education*, 369 F. 2d 55 (CA6 1966), cert. denied, 389 U. S. 847 (1967); *Downs* v. *Board of Education*, 336 F. 2d 988 (CA10 1964), cert. denied, 380 U. S. 914 (1965); *Bell* v. *School City of Gary, Ind.*, 324 F. 2d 209 (CA7 1963), cert. denied, 377 U. S. 924 (1964).] Ohio discarded its statute in 1887, Indiana in 1949, and Kansas City not until the advent of *Brown*. If Negro and white parents in

[12] Indeed, if one goes back far enough, it is probable that all racial segregation, wherever occurring and whether or not confined to the schools, has at some time been supported or maintained by government action. In *Beckett* v. *School Board*, 308 F. Supp. 1274, 1311–1315 (ED Va. 1969), Judge Hoffman compiled a summary of past public segregative action which included examples from a great majority of States. He concluded that "[o]nly as to the states of Maine, New Hampshire, Vermont, Washington, Nevada, and Hawaii does it appear from this nonexhaustive research that no discriminatory laws appeared on the books at one time or another." *Id.*, at 1315.

> Mississippi are required to bus their children to distant schools on the theory that the consequences of past de jure segregation cannot otherwise be dissipated, should not the same reasoning apply in Gary, Indiana, where no more than five years before *Brown* the same practice existed with presumably the same effects?" Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif. L. Rev. 275, 297 (1972).[13]

Not only does the *de jure/de facto* distinction operate inequitably on communities in different sections of the country, more importantly, it disadvantages minority children as well. As the Fifth Circuit stated:

> " 'The Negro children in Cleveland, Chicago, Los Angeles, Boston, New York, or any other area of the nation which the opinion classifies under de facto segregation, would receive little comfort from the assertion that the racial make-up of their school system does not violate their constitutional rights because they were born into a de facto society, while the exact same racial make-up of the school system in the 17 Southern and border states violates the

[13] The author continues:

"True, the earlier the policy of segregation was abandoned the less danger there is that it continues to operate covertly, is significantly responsible for present day patterns of residential segregation, or has contributed materially to present community attitudes toward Negro schools. But there is no reason to suppose that 1954 is a universally appropriate dividing line between de jure segregation that may safely be assumed to have spent itself and that which may not. For many remedial purposes, adoption of an arbitrary but easily administrable cutoff point might not be objectionable. But in a situation such as school desegregation, where both the rights asserted and the remedial burdens imposed are of such magnitude, and where the resulting sectional discrimination is passionately resented, it is surely questionable whether such arbitrariness is either politically or morally acceptable."

constitutional rights of their counterparts, or even their blood brothers, because they were born into a de jure society. All children everywhere in the nation are protected by the Constitution, and treatment which violates their constitutional rights in one area of the country, also violates such constitutional rights in another area.'" *Cisneros* v. *Corpus Christi Independent School District*, 467 F. 2d 142, 148 (CA5 1972) (en banc), quoting *United States* v. *Jefferson County Board of Education*, 380 F. 2d 385, 397 (CA5 1967) (Gewin, J., dissenting).[14]

The Court today does move for the first time toward breaking down past sectional disparities, but it clings tenuously to its distinction. It searches for *de jure* action in what the Denver School Board has done or failed to do, and even here the Court does not rely upon the results or effects of the Board's conduct but feels compelled to find segregative intent: [15]

"We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto*

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[14] See Bickel, *supra*, n. 7, at 119:

"If a Negro child perceives his separation as discriminatory and invidious, he is not, in a society a hundred years removed from slavery, going to make fine distinctions about the source of a particular separation."

[15] The Court today does not require, however, a segregative intent with respect to the entire school system, and indeed holds that if such an intent is found with respect to some schools in a system, the burden—normally on the plaintiffs—shifts to the defendant school authorities to prove a negative: namely, that their purposes were benign, *ante*, at 207–209.

The Court has come a long way since *Brown I*. Starting from the unassailable *de jure* ground of the discriminatory constitutional and statutory provisions of some States, the new formulation—still professing fidelity to the *de jure* doctrine—is that desegregation will be ordered despite the absence of any segregative laws if: (i) segregated schools in fact exist; (ii) a court finds that they result from

> segregation to which we referred in *Swann* is *purpose or intent* to segregate." *Ante*, at 208 (emphasis is the Court's).

The Court's insistence that the "differentiating factor" between *de jure* and *de facto* segregation be "purpose or intent" is difficult to reconcile with the language in so recent a case as *Wright* v. *Council of the City of Emporia*, 407 U. S. 451 (1972). In holding there that "motivation" is irrelevant, the Court said:

> "In addition, an inquiry into the 'dominant' motivation of school authorities is as irrelevant as it is fruitless. The mandate of *Brown II* was to desegregate schools, and we have said that '[t]he measure of any desegregation plan is its effectiveness.' *Davis* v. *School Commissioners of Mobile County*, 402 U. S. 33, 37. Thus, we have focused upon the effect—not the purpose or motivation—of a school board's action in determining whether it is a permissible method of dismantling a dual system. . . .
>
> ". . . Though the *purpose* of the new school districts was found to be discriminatory in many of these cases, the courts' holdings rested not on motivation or purpose but on the *effect* of the action upon the dismantling of the dual school systems involved. That was the focus of the District Court in this case, and we hold that its approach was proper." 407 U. S., at 462.

I can discern no basis in law or logic for holding that the motivation of school board action is irrelevant in Virginia and controlling in Colorado. It may be argued, of course, that in *Emporia* a prior constitutional viola-

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some action taken with segregative intent by the school board; (iii) such action relates to any "meaningful segment" of the school system; and (iv) the school board cannot prove that its intentions with respect to the remainder of the system were nonsegregative.

tion had already been proved and that this justifies the distinction. The net result of the Court's language, however, is the application of an *effect* test to the actions of southern school districts and an *intent* test to those in other sections, at least until an initial *de jure* finding for those districts can be made. Rather than straining to perpetuate any such dual standard, we should hold forthrightly that significant segregated school conditions in any section of the country are a prima facie violation of constitutional rights. As the Court has noted elsewhere:

> "Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that *mere chance* resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. *The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner.*" *Hernandez* v. *Texas*, 347 U. S. 475, 482 (1954). (Emphasis added.)

B

There is thus no reason as a matter of constitutional principle to adhere to the *de jure/de facto* distinction in school desegregation cases. In addition, there are reasons of policy and prudent judicial administration which point strongly toward the adoption of a uniform national rule. The litigation heretofore centered in the South already is surfacing in other regions. The decision of the Court today, emphasizing as it does the elusive element of segregative intent, will invite numerous desegregation suits in which there can be little hope of uniformity of result.

The issue in these cases will not be whether segregated education exists. This will be conceded in most of them.

The litigation will focus as a consequence of the Court's decision on whether segregation has resulted in any "meaningful or significant" portion of a school system from a school board's "segregative intent." The intractable problems involved in litigating this issue are obvious to any lawyer. The results of litigation—often arrived at subjectively by a court endeavoring to ascertain the subjective intent of school authorities with respect to action taken or not taken over many years—will be fortuitous, unpredictable and even capricious.

The Denver situation is illustrative of the problem. The courts below found evidence of *de jure* violations with respect to the Park Hill schools and an absence of such violations with respect to the core city schools, despite the fact that actions taken by the school board with regard to those two sections were not dissimilar. It is, for example, quite possible to contend that both the construction of Manual High School in the core city area and Barrett Elementary School in the Park Hill area operated to serve their surrounding Negro communities and, in effect, to merge school attendance zones with segregated residential patterns. See Brief for Petitioners 80–83. Yet findings even on such similar acts will, under the *de jure/de facto* distinction, continue to differ, especially since the Court has never made clear what suffices to establish the requisite "segregative intent" for an initial constitutional violation. Even if it were possible to clarify this question, wide and unpredictable differences of opinion among judges would be inevitable when dealing with an issue as slippery as "intent" or "purpose," especially when related to hundreds of decisions made by school authorities under varying conditions over many years.

This Court has recognized repeatedly that it is "extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a

legislative enactment," *Palmer* v. *Thompson*, 403 U. S. 217, 224 (1971); *McGinnis* v. *Royster*, 410 U. S. 263, 276–277 (1973); *United States* v. *O'Brien*, 391 U. S. 367, 381 (1968). Whatever difficulties exist with regard to a single statute will be compounded in a judicial review of years of administration of a large and complex school system.[16] Every act of a school board and school administration, and indeed every failure to act where affirmative action is indicated, must now be subject to scrutiny. The most routine decisions with respect to the operation of schools, made almost daily, can affect in varying degrees the extent to which schools are initially segregated, remain in that condition, are desegregated, or—for the long term future—are likely to be one or the other. These decisions include action or nonaction with respect to school building construction and location; the timing of building new schools and their size; the closing and consolidation of schools; the drawing or gerrymandering of

[16] As one commentator has expressed it:

"If the courts are indeed prepared to inquire into motive, thorny questions will arise even if one assumes that racial motivation is capable of being proven at trial. What of the case in which one or more members of a school board, but less than a majority, are found to have acted on racial grounds? What if it appears that the school board's action was prompted by a mixture of motives, including constitutionally innocent ones that alone would have prompted the board to act? What if the members of the school board were not themselves racially inspired but wished to please their constituents, many of whom they knew to be so? If such cases are classified as unconstitutional de jure segregation, there is little point in preserving the de jure-de facto distinction at all. And it may well be that the difference between any of these situations and one in which racial motivation is altogether lacking is too insignificant, from the standpoint of both the moral culpability of the state officials and the impact upon the children involved, to support a difference in constitutional treatment." Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif. L. Rev. 275, 284–285 (1972).

student attendance zones; the extent to which a neighborhood policy is enforced; the recruitment, promotion and assignment of faculty and supervisory personnel; policies with respect to transfers from one school to another; whether, and to what extent, special schools will be provided, where they will be located, and who will qualify to attend them; the determination of curriculum, including whether there will be "tracks" that lead primarily to college or to vocational training, and the routing of students into these tracks; and even decisions as to social, recreational, and athletic policies.

In *Swann* the Court did not have to probe into segregative intent and proximate cause with respect to each of these "endless" factors. The basis for its *de jure* finding there was rooted primarily in the prior history of the desegregation suit. 402 U. S., at 5–6. But in a case of the present type, where no such history exists, a judicial examination of these factors will be required under today's decision. This will lead inevitably to uneven and unpredictable results, to protracted and inconclusive litigation, to added burdens on the federal courts, and to serious disruption of individual school systems. In the absence of national and objective standards, school boards and administrators will remain in a state of uncertainty and disarray, speculating as to what is required and when litigation will strike.

C

Rather than continue to prop up a distinction no longer grounded in principle, and contributing to the consequences indicated above, we should acknowledge that whenever public school segregation exists to a substantial degree there is prima facie evidence of a constitutional violation by the responsible school board. It is true, of course, that segregated schools—wherever located—are not solely the product of the action or

inaction of public school authorities. Indeed, as indicated earlier, there can be little doubt that principal causes of the pervasive school segregation found in the major urban areas of this country, whether in the North, West, or South, are the socio-economic influences which have concentrated our minority citizens in the inner cities while the more mobile white majority disperse to the suburbs. But it is also true that public school boards have continuing, detailed responsibility for the public school system within their district and, as Judge John Minor Wisdom has noted, "[w]hen the figures [showing segregation in the schools] speak so eloquently, a *prima facie* case of discrimination is established." *United States* v. *Texas Education Agency,* 467 F. 2d 848, 873 (CA5 1972) (en banc). Moreover, as foreshadowed in *Swann* and as implicitly held today, school boards have a duty to minimize and ameliorate segregated conditions by pursuing an affirmative policy of desegregation. It is this policy which must be applied consistently on a national basis without regard to a doctrinal distinction which has outlived its time.

III

The preceding section addresses the constitutional obligation of public authorities in the school districts throughout our country to operate *integrated school systems.* When the schools of a particular district are found to be substantially segregated, there is a prima facie case that this obligation has not been met. The burden then shifts to the school authorities to demonstrate that they have in fact operated an integrated system as this term is defined, *supra,* at 227–228. If there is a failure successfully to rebut the prima facie case, the question then becomes what reasonable affirmative desegregative steps district courts may require to

place the school system in compliance with the constitutional standard. In short, what specifically is the nature and scope of the remedy?

As the Court's opinion virtually compels the finding on remand that Denver has a "dual school system," that city will then be under an "affirmative duty" to desegregate its entire system "root and branch." *Green* v. *County School Board,* 391 U. S., at 437–438. Again, the critical question is, what ought this constitutional duty to entail?

A

The controlling case is *Swann, supra,* and the question which will confront and confound the District Court and Denver School Board is what, indeed, does *Swann* require? *Swann* purported to enunciate no new principles, relying heavily on *Brown I* and *II* and on *Green.* Yet it affirmed a district court order which had relied heavily on "racial ratios" and sanctioned transportation of elementary as well as secondary pupils. Lower federal courts have often read *Swann* as requiring far-reaching transportation decrees [17] "to achieve the greatest possible degree of actual

[17] See, *e. g., Thompson* v. *School Board of Newport News,* 465 F. 2d 83, 87 (1972), where the Fourth Circuit en banc upheld a district court assignment plan where "travel time, varying from a minimum of forty minutes and a maximum of one hour, each way, would be required for busing black students out of the old City and white students into the old City in order to achieve a racial balancing of the district." This transportation was decreed for children from the third grade up, involving children as young as eight years of age.

In *Northcross* v. *Board of Education of Memphis City Schools,* 466 F. 2d 890, 895 (1972), the Sixth Circuit affirmed a district court assignment plan which daily transported 14,000 children with "the maximum time to be spent on the buses by any child [being] 34 minutes . . . ," presumably each way. But as Judge Weick noted in dissent the Sixth Circuit instructed the district judge to implement yet further desegregation orders. Plans presently under consideration by that court call for the busing of 39,085 and 61,530

desegregation." 402 U. S., at 26. In the context of a large urban area, with heavy residential concentrations of white and black citizens in different—and widely separated—sections of the school district, extensive dispersal and transportation of pupils is inevitable if *Swann* is read as expansively as many courts have been reading it to date.

To the extent that *Swann* may be thought to *require* large-scale or long-distance transportation of students in our metropolitan school districts, I record my profound misgivings. Nothing in our Constitution commands or encourages any such court-compelled disruption of public education. It may be more accurate to view *Swann* as having laid down a broad rule of reason under which desegregation remedies must remain flexible and other values and interests be considered. Thus the Court recognized that school authorities, not the federal judiciary, must be charged in the first instance with the task of desegregating local school systems. *Id.*, at 16. It noted that school boards in rural areas can adjust more readily to this task than those in metropolitan districts "with dense and shifting population, numerous schools, congested and complex traffic patterns." *Id.*, at 14. Although the use of pupil transportation was approved as a remedial device, transportation orders are suspect "when the time or distance of travel is so great

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children respectively, for undetermined lengths of time. *Id.*, at 895–896.

Petitioners before this Court in *Potts* v. *Flax*, No. 72–288, cert. denied, 409 U. S. 1007 (1972), contended that the implementation of the Fifth Circuit's directive in *Flax* v. *Potts*, 464 F. 2d 865 (1972), would require bus rides of up to two hours and 20 minutes each day and a round trip of up to 70 miles. Pet. for Cert. 14. While respondents contended these figures represent an "astounding inflation," Brief in Opposition 7, transportation of a significant magnitude seems inevitable.

as to either risk the health of the children or significantly impinge on the educational process." *Id.*, at 30–31. Finally, the age of the pupils to be transported was recognized by the Court in *Swann* as one important limitation on the time of student travel. *Id.*, at 31.

These factors were supposed to help guide district courts in framing equitable remedies in school desegregation cases.[18] And the Court further emphasized that equitable decrees are inherently sensitive, not solely to the degree of desegregation to be achieved, but to a variety of other public and private interests:

> "[A] school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution. *Id.*, at 15–16.

Those words echoed a similar expression in *Brown II*, 349 U. S., at 300:

> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."

Thus, in school desegregation cases, as elsewhere, equity counsels reason, flexibility, and balance. See, *e. g.*, *Lemon*

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[18] See *United States* v. *Texas Education Agency*, 467 F. 2d 848, 883 (CA5 1972) (Bell, J., concurring in an opinion in which seven other judges joined):

"In our view the remedy which the district court is required to formulate should be formulated within the *entire context* of the opinion in Swann v. Charlotte-Mecklenburg Board of Education . . . ." (Emphasis added.)

v. *Kurtzman*, 411 U. S. 192 (1973). I am aware, of course, that reasonableness in any area is a relative and subjective concept. But with school desegregation, reasonableness would seem to embody a balanced evaluation of the obligation of public school boards to promote desegregation with other, equally important educational interests which a community may legitimately assert. Neglect of either the obligation or the interests destroys the even-handed spirit with which equitable remedies must be approached.[19] Overzealousness in pursuit of any single goal is untrue to the tradition of equity and to the "balance" and "flexibility" which this Court has always respected.

B

Where school authorities have defaulted in their duty to operate an integrated school system, district courts must insure that affirmative desegregative steps ensue. Many of these can be taken effectively without damaging state and parental interests in having children attend schools within a reasonable vicinity of home. Where desegregative steps are possible within the framework of a system of "neighborhood education," school authorities must pursue them. For example, boundaries of neighborhood attendance zones should be drawn to integrate, to the extent practicable, the school's student body. Construction of new schools should be of

[19] The relevant inquiry is "whether the costs of achieving desegregation in any given situation outweigh the legal, moral, and educational considerations favoring it. . . . It is clear . . . that the Constitution should not be held to require any transportation plan that keeps children on a bus for a substantial part of the day, consumes significant portions of funds otherwise spendable directly on education, or involves a genuine element of danger to the safety of the child." Comment, School Desegregation After *Swann:* A Theory of Government Responsibility, 39 U. Chi. L. Rev. 421, 422, 443 (1972).

such a size and at such a location as to encourage the likelihood of integration, *Swann, supra,* at 21. Faculty integration should be attained throughout the school system, *id.,* at 19; *United States* v. *Montgomery County Board of Education,* 395 U. S. 225 (1969). An optional majority-to-minority transfer program, with the State providing free transportation to desiring students, is also a helpful adjunct to a desegregated school system. *Swann, supra,* at 26–27. It hardly need be repeated that allocation of resources within the school district must be made with scrupulous fairness among all schools.

The above examples are meant to be illustrative, not exhaustive. The point is that the overall integrative impact of such school board decisions must be assessed by district courts in deciding whether the duty to desegregate has been met. For example, "neighborhood school plans are constitutionally suspect when attendance zones are superficially imposed upon racially defined neighborhoods, and when school construction preserves rather than eliminates the racial homogeny [*sic*] of given schools." [20] *Keyes* v. *School District No. 1,* 445 F. 2d 990, 1005 (CA10 1971). See also *United States* v. *Board of Education of Tulsa County,* 429 F. 2d 1253, 1258–1259 (CA10 1970). This does not imply that decisions on faculty assignment, attendance zones, school construction, closing and consolidation, must be made to the detriment of all neutral, nonracial considerations. But these considerations can, with proper school board initiative, generally be met in a manner that will enhance the degree of school desegregation.

C

Defaulting school authorities would have, at a minimum, the obligation to take affirmative steps of the sort

[20] A useful study of the historical uses and abuses of the neighborhood school concept is M. Weinberg, Race & Place (1967).

outlined in the above section. School boards would, of course, be free to develop and initiate further plans to promote school desegregation. In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, and cooperate with one another in their common pursuits and endeavors. Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience.

A *constitutional requirement* of extensive student transportation solely to achieve integration presents a vastly more complex problem. It promises, on the one hand, a greater degree of actual desegregation, while it infringes on what may fairly be regarded as other important community aspirations and personal rights. Such a requirement is also likely to divert attention and resources from the foremost goal of any school system: the best quality education for all pupils. The Equal Protection Clause does, indeed, command that racial discrimination not be tolerated in the decisions of public school authorities. But it does not require that school authorities undertake widespread student transportation solely for the sake of maximizing integration.[21]

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[21] In fact, due to racially separate residential patterns that characterize our major urban areas it is quite unrealistic to think of achieving in many cities substantial integration throughout the school district without a degree of student transportation which would have the gravest economic and educational consequences. As Professor Bickel notes:

"In most of the larger urban areas, demographic conditions are such that no policy that a court can order, and a school board, a city, or even a state has the capability to put into effect, will in fact result in the foreseeable future in racially balanced public schools. Only a reordering of the environment involving economic and social policy on the broadest conceivable front might have an appreciable impact." Bickel, *supra*, n. 7, at 132.

This obviously does not mean that bus transportation has no place in public school systems or is not a permissible means in the desegregative process. The transporting of school children is as old as public education, and in rural and some suburban settings it is as indispensable as the providing of books. It is presently estimated that approximately half of all American children ride buses to school for reasons unrelated to integration.[22] At the secondary level in particular, where the schools are larger and serve a wider, more dispersed constituency than elementary schools, some form of public or privately financed transportation is often necessary. There is a significant difference, however, in transportation plans voluntarily initiated by local school boards for educational purposes and those imposed by a federal court. The former usually represent a necessary or convenient means of access to the school nearest home; the latter often require lengthy trips for no purpose other than to further integration.[23] Yet the

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[22] Estimates vary. *Swann*, 402 U. S., at 29, noted that "[e]ighteen million of the Nation's public school children, approximately 39%, were transported to their schools by bus in 1969–1970 in all parts of the country." Senator Ribicoff, a thoughtful student of this problem, stated that "[t]wo-thirds of all American children today ride buses to schools for reasons unrelated to integration." 118 Cong. Rec. 5456 (1972).

[23] Historically, distant transportation was wrongly used to promote segregation. "Negro children were generally considered capable of traveling longer distances to school and without the aid of any vehicle. What was too far for a white child became reasonably near for a Negro child," Weinberg, *supra*, n. 20, at 87.

This deplorable history has led some to argue that integrative bus rides are justified as atonement for past segregative trips and that neighborhood education is now but a code word for racial segregation. But misuse of transportation in the past does not imply neighborhood schooling has no valid nonsegregative uses for the present. Nor would wrongful transportation in the past justify detrimental transportation for the children of today.

Court in *Swann* was unquestionably right in describing bus transportation as "one tool of school desegregation." 402 U. S., at 30.[24] The crucial issue is when, under what circumstances, and to what extent such transportation may appropriately be ordered. The answer to this turns—as it does so often in the law—upon a sound exercise of discretion under the circumstances.

Swann itself recognized limits to desegregative obligations. It noted that a constitutional requirement of "any particular degree of racial balance or mixing . . . would be disapproved . . . ," and sanctioned district court use of mathematical ratios as "no more than a starting point in the process of shaping a remedy . . . ." *Id.*, at 24, 25. Thus, particular schools may be all white or all black and still not infringe constitutional rights if the *system* is genuinely integrated and school authorities are pursuing integrative steps short of extensive and disruptive transportation. The refusal of the Court in *Swann* to require racial balance in schools throughout the district or the arbitrary elimination of all "one-race schools," *id.*, at 26, is grounded in a recognition that

[24] Some communities had transportation plans in effect at the time of court desegregation orders. See *Swann, supra*, at 29 n. 11; *Davis* v. *Board of School Commissioners of Mobile County*, 402 U. S. 33, 34–35 (1971). Courts have used the presence or absence of existing transportation in a district as one factor in framing and implementing desegregation decrees. *United States* v. *Watson Chapel School District*, 446 F. 2d 933, 937 (CA8 1971); *Northcross* v. *Board of Education of Memphis City Schools*, 444 F. 2d 1179, 1182–1183 (CA6 1971); *Davis* v. *Board of Education of North Little Rock*, 328 F. Supp. 1197, 1203 (ED Ark. 1971). Where a school board is voluntarily engaged in transporting students, a district court is, of course, obligated to insure that such transportation is not undertaken with segregative effect. Where, also, voluntary transportation programs are already in progress, there may be greater justification for court-ordered transportation of students *for a comparable time and distance* to achieve greater integration.

the State, parents, and children all have at stake in school desegregation decrees, legitimate and recognizable interests.

The personal interest might be characterized as the desire that children attend community schools near home. Dr. James Coleman testified for petitioners at trial that "most school systems organize their schools in relation to the residents by having fixed school districts and some of these are very ethnically homogeneous." App. 1549a. In *Deal* v. *Cincinnati Board of Education*, 369 F. 2d, at 60, the Sixth Circuit summarized the advantages of such a neighborhood system of schools: [25]

> "Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in the creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil

[25] The term "neighborhood school" should not be supposed to denote solely a walk-in school or one which serves children only in the surrounding blocks. The Court has noted, in a different context, that "[t]he word 'neighborhood' is quite as susceptible of variation as the word 'locality.' Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles." *Connally* v. *General Construction Co.*, 269 U. S. 385, 395 (1926). In the school context, "neighborhood" refers to relative proximity, to a preference for a school nearer to, rather than more distant from, home.

placement and administration through the use of neutral, easily determined standards, and better home-school communication."

The neighborhood school does provide greater ease of parental and student access and convenience, as well as greater economy of public administration. These are obvious and distinct advantages, but the legitimacy of the neighborhood concept rests on more basic grounds.[26]

Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education. Public schools have been a traditional source of strength to our Nation, and that strength may derive in part from the identification of many schools with the personal features of the surrounding neighborhood. Community support, interest, and dedication to public schools may well run higher with a neighborhood attendance pattern: distance may encourage disinterest. Many citizens sense today a decline in the intimacy of our institutions—home, church, and school—which has caused a concomitant decline in the unity and communal spirit of our people. I pass no judgment on this viewpoint, but I do believe that this Court should be wary of compelling in the name of constitutional law what may seem to many a dissolution in the traditional, more personal fabric of their public schools.

Closely related to the concept of a community and neighborhood education, are those rights and duties parents have with respect to the education of their children. The law has long recognized the parental duty to nurture, support, and provide for the welfare of children, includ-

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[26] I do not imply that the neighborhood concept must be embodied in every school system. But where a school board has chosen it, federal judges should accord it respect in framing remedial decrees.

ing their education. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535, a unanimous Court held that:

> "Under the doctrine of *Meyer* v. *Nebraska*, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

And in *Griswold* v. *Connecticut*, 381 U. S. 479, 482 (1965), the Court noted that in *Pierce*, "the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments." I do not believe recognition of this right can be confined solely to a parent's choice to send a child to public or private school. Most parents cannot afford the luxury of a private education for their children, and the dual obligation of private tuitions and public taxes. Those who may for numerous reasons seek public education for their children should not be forced to forfeit all interest or voice in the school their child attends. It would, of course, be impractical to allow the wishes of particular parents to be controlling. Yet the interest of the parent in the enhanced parent-school and parent-child communication allowed by the neighborhood unit ought not to be suppressed by force of law.

In the commendable national concern for alleviating public school segregation, courts may have overlooked the fact that the rights and interests of children affected by a desegregation program also are entitled to consideration. Any child, white or black, who is compelled to leave his neighborhood and spend significant time each

day being transported to a distant school suffers an impairment of his liberty and his privacy. Not long ago, James B. Conant wrote that "[a]t the elementary school level the issue seems clear. To send young children day after day to distant schools by bus seems out of the question." [27] A community may well conclude that the portion of a child's day spent on a bus might be used more creatively in a classroom, playground, or in some other extracurricular school activity. Decisions such as these, affecting the quality of a child's daily life, should not lightly be held constitutionally errant.

Up to this point I have focused mainly on the personal interests of parents and children which a community may believe to be best protected by a neighborhood system of schools. But broader considerations lead me to question just as seriously any remedial requirement of extensive student transportation solely to further integration. Any such requirement is certain to fall disproportionately on the school districts of our country, depending on their degree of urbanization, financial resources, and their racial composition. Some districts with little or no biracial population will experience little or no educational disruption, while others, notably in large, biracial metropolitan areas, must at considerable expense undertake extensive transportation to achieve the type of integration frequently being ordered by district courts.[28] At a time when public education generally is suffering serious financial malnutrition, the economic burdens of such transportation can be severe, requiring both initial capital outlays and annual operating costs in the millions of dollars.[29] And while constitutional requirements have

[27] Slums and Suburbs 29 (1961).

[28] See n. 21, *supra*.

[29] In Memphis, for example, which has no history of busing students, the minimum transportation plan ordered by the courts will require, in the School Board's estimate, an initial capital expenditure

often occasioned uneven burdens, never have they touched so sensitive a matter as wide differences in the compulsory transportation requirements for literally hundreds of thousands of school children.

The argument for student transportation also overlooks the fact that the remedy exceeds that which may be necessary to redress the constitutional evil. Let us use Denver as an example. The Denver School Board, by its action and nonaction, may be legally responsible for some of the segregation that exists. But if one assumes a maximum discharge of constitutional duty by the Denver Board over the past decades, the fundamental problem of residential segregation would persist.[30] It is, indeed, a novel application of equitable power—not to mention a dubious extension of constitutional doctrine—to require so much greater a degree of forced school integration than would have resulted from purely natural and neutral nonstate causes.

The compulsory transportation of students carries a further infirmity as a constitutional remedy. With most constitutional violations, the major burden of remedial action falls on offending state officials. Public officials who act to infringe personal rights of speech, voting, or religious exercise, for example, are obliged to cease the offending act or practice and, where necessary, institute corrective measures. It is they who bear the brunt of remedial action, though other citizens will to varying de-

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of $1,664,192 for buses plus an annual operating cost of $629,192. The Board estimates that a more extensive transportation program to be considered by the district court will require initial capital investments of $3,924,000 and annual operating costs of $1,783,490. The most drastic transportation plan before the district court requires estimated annual operating costs of from $2,354,220, $2,431,710, or $3,463,100 depending on the Board's transportation arrangements. *Northcross* v. *Board of Education of Memphis City Schools*, 466 F. 2d, at 898 (Weick, J., dissenting).

[30] See n. 9, *supra*.

grees feel its effects. School authorities responsible for segregation must, at the very minimum, discontinue segregative acts. But when the obligation further extends to the transportation of students, the full burden of the affirmative remedial action is borne by children and parents who did not participate in any constitutional violation.

Finally, courts in requiring so far-reaching a remedy as student transportation solely to maximize integration, risk setting in motion unpredictable and unmanageable social consequences. No one can estimate the extent to which dismantling neighborhood education will hasten an exodus to private schools, leaving public school systems the preserve of the disadvantaged of both races. Or guess how much impetus such dismantlement gives the movement from inner city to suburb, and the further geographical separation of the races. Nor do we know to what degree this remedy may cause deterioration of community and parental support of public schools, or divert attention from the paramount goal of quality in education to a perennially divisive debate over who is to be transported where.

The problem addressed in this opinion has perplexed courts, school officials, other public authorities, and students of public education for nearly two decades. The problem, especially since it has focused on the "busing issue," has profoundly disquieted the public wherever extensive transportation has been ordered. I make no pretense of knowing the best answers. Yet, the issue in this and like cases comes to this Court as one of constitutional law. As to this issue, I have no doubt whatever. There is nothing in the Constitution, its history, or—until recently—in the jurisprudence of this Court that mandates the employment of forced transportation of young and teenage children to achieve a single interest,

as important as that interest may be. We have strayed, quite far as I view it, from the rationale of *Brown I* and *II*, as reiterated in *Swann*, that courts in fashioning remedies must be "guided by equitable principles" which include the "adjusting and reconciling [of] public and private needs," *Brown II*, 349 U. S., at 300.

I urge a return to this rationale. This would result, as emphasized above, in no prohibition on court-ordered student transportation in furtherance of desegregation. But it would require that the legitimate community interests in neighborhood school systems be accorded far greater respect. In the balancing of interests so appropriate to a fair and just equitable decree, transportation orders should be applied with special caution to any proposal as disruptive of family life and interests—and ultimately of education itself—as extensive transportation of elementary-age children solely for desegregation purposes. As a minimum, this Court should not require school boards to engage in the unnecessary transportation away from their neighborhoods of elementary-age children.[31] It is at this age level that neighborhood education performs its most vital role. It is with respect to children of tender years that the greatest concern exists for their physical and psychological health. It is also here, at the elementary school,

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[31] There may well be advantages in commencing the integrative experiences at an early age, as young children may be less likely than older children and adults to develop an inhibiting racial consciousness. These advantages should be considered as school boards make the various decisions with the view to achieving and preserving an integrated school system. *Supra*, at 226–227. But in the balancing of all relevant interests, the advantages of an early integrative experience must, and in all fairness should, be weighed against other relevant advantages and disadvantages and in light of the demographic characteristics of the particular community.

that the rights of parents and children are most sharply implicated.[32]

IV

The existing state of law has failed to shed light and provide guidance on the two issues addressed in this opinion: (i) whether a constitutional rule of uniform, national application should be adopted with respect to our national problem of school desegregation and (ii), if so, whether the ambiguities of *Swann,* construed to date almost uniformly in favor of extensive transportation, should be redefined to restore a more viable balance among the various interests which are involved. With all deference, it seems to me that the Court today has addressed neither of these issues in a way that will afford adequate guidance to the courts below in this case or lead to a rational, coherent national policy.

The Court has chosen, rather, to adhere to the *de facto/de jure* distinction under circumstances, and upon a rationale, which can only lead to increased and inconclusive litigation, and—especially regrettable—to deferment of a nationally consistent judicial position on this subject. There is, of course, state action in every school district in the land. The public schools always have been funded and operated by States and their local subdivisions. It is true that segregated schools, even in the cities of the South, are in large part the product of social and economic factors—and the resulting residential patterns. But there is also not a school district in the United States, with any significant minority school population, in which the school authorities—in one way or the other—have not contributed in some

[32] While greater transportation of secondary school students might be permitted, even at this level the desire of a community for racially neutral neighborhood schools should command judicial respect. It would ultimately be wisest, where there is no absence of good faith, to permit affected communities to decide this delicate issue of student transportation on their own.

measure to the degree of segregation which still prevails. Instead of recognizing the reality of similar, multiple segregative causes in school districts throughout the country, the Court persists in a distinction whose duality operates unfairly on local communities in one section of the country and on minority children in the others.

The second issue relates to the ambiguities of *Swann* and the judicial disregard of legitimate community and individual interests in framing equitable decrees. In the absence of a more flexible and reasonable standard than that imposed by district courts after *Swann,* the desegregation which will now be decreed in Denver and other major cities may well involve even more extensive transportation than has been witnessed up to this time.

It is well to remember that the course we are running is a long one and the goal sought in the end—so often overlooked—is the best possible educational opportunity for all children. Communities deserve the freedom and the incentive to turn their attention and energies to this goal of quality education, free from protracted and debilitating battles over court-ordered student transportation. The single most disruptive element in education today is the widespread use of compulsory transportation, especially at elementary grade levels. This has risked distracting and diverting attention from basic educational ends, dividing and embittering communities, and exacerbating, rather than ameliorating, interracial friction and misunderstanding. It is time to return to a more balanced evaluation of the recognized interests of our society in achieving desegregation with other educational and societal interests a community may legitimately assert. This will help assure that integrated school systems will be established and maintained by rational action, will be better understood and supported by parents and children of both races, and will promote the enduring qualities of an integrated society so essential to its genuine success.

MR. JUSTICE REHNQUIST, dissenting.

I

The Court notes at the outset of its opinion the differences between the claims made by the plaintiffs in this case and the classical "*de jure*" type of claims made by plaintiffs in cases such as *Brown* v. *Board of Education*, 347 U. S. 483 (1954), and its progeny. I think the similarities and differences, not only in the claims, but in the nature of the constitutional violation, deserve somewhat more attention than the Court gives them.

In *Brown*, the Court held unconstitutional statutes then prevalent in Southern and border States mandating that Negro children and white children attend separate schools. Under such a statute, of course, every child in the school system is segregated by race, and there is no racial mixing whatever in the population of any particular school.

It is conceded that the State of Colorado and the city of Denver have never had a statute or ordinance of that description. The claim made by these plaintiffs, as described in the Court's opinion, is that the School Board by "use of various techniques such as the manipulation of student attendance zones, schoolsite selection and a neighborhood school policy" took race into account in making school assignments in such a way as to lessen that mixing of races which would have resulted from a racially neutral policy of school assignment. If such claims are proved, those minority students who as a result of such manipulative techniques are forced to attend schools other than those that they would have attended had attendance zones been neutrally drawn are undoubtedly deprived of their constitutional right to equal protection of the laws just as surely as were the plaintiffs in *Brown* v. *Board of Education* by the statutorily required segregation in that case. But the fact that invid-

ious racial discrimination is prohibited by the Constitution in the North as well as the South must not be allowed to obscure the equally important fact that the consequences of manipulative drawing of attendance zones in a school district the size of Denver does not necessarily result in denial of equal protection to all minority students within that district. There are significant differences between the proof which would support a claim such as that alleged by plaintiffs in this case, and the total segregation required by statute which existed in *Brown*.

The Court's opinion obscures these factual differences between the situation shown by the record to have existed in Denver and the situations dealt with in earlier school desegregation opinions of the Court. The Court states, *ante*, at 200, that "[w]e have never suggested that plaintiffs in school desegregation cases must bear the burden of proving the elements of *de jure* segregation as to each and every school or each and every student within the school system. Rather, we have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954) (*Brown I*), the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system,' *Brown* v. *Board of Education*, 349 U. S. 294, 301 (1955) (*Brown II*) . . . ."

That statement is, of course, correct in the *Brown* context, but in the *Brown* cases and later ones that have come before the Court the situation which had invariably obtained at one time was a "dual" school system mandated by law, by a law which prohibited Negroes and whites from attending the same schools. Since under *Brown* such a law deprived each Negro child of the equal protection of the laws, there was no need to prove "the

elements of *de jure* segregation as to each and every school," since the law itself had required just that sort of segregation.

But in a school district the size of Denver's, it is quite conceivable that the School Board might have engaged in the racial gerrymandering of the attendance boundary between two particular schools in order to keep one largely Negro and Hispano, and the other largely Anglo, as the District Court found to have been the fact in this case. Such action would have deprived affected minority students who were the victims of such gerrymandering of their constitutional right to equal protection of the laws. But if the school board had been evenhanded in its drawing of the attendance lines for other schools in the district, minority students required to attend other schools within the district would have suffered no such deprivation. It certainly would not reflect normal English usage to describe the entire district as "segregated" on such a state of facts, and it would be a quite unprecedented application of principles of equitable relief to determine that if the gerrymandering of one attendance zone were proved, particular racial mixtures could be required by a federal district court for every school in the district.

It is quite possible, of course, that a school district purporting to adopt racially neutral boundary zones might, with respect to every such zone, invidiously discriminate against minorities, so as to produce substantially the same result as was produced by the statutorily decreed segregation involved in *Brown*. If that were the case, the consequences would necessarily have to be the same as were the consequences in *Brown*. But, in the absence of a statute requiring segregation, there must necessarily be the sort of factual inquiry which was unnecessary in those jurisdictions where racial mixing in the schools was forbidden by law.

Underlying the Court's entire opinion is its apparent thesis that a district judge is at least permitted to find that if a single attendance zone between two individual schools in the large metropolitan district is found by him to have been "gerrymandered," the school district is guilty of operating a "dual" school system, and is apparently a candidate for what is in practice a federal receivership. Not only the language of the Court in the opinion, but its reliance on the case of *Green* v. *County School Board,* 391 U. S. 430, 437–438 (1968), indicates that such would be the case. It would therefore presumably be open to the District Court to require, *inter alia,* that pupils be transported great distances throughout the district to and from schools whose attendance zones have not been gerrymandered. Yet, unless the Equal Protection Clause of the Fourteenth Amendment now be held to embody a principle of "taint," found in some primitive legal systems but discarded centuries ago in ours, such a result can only be described as the product of judicial fiat.

Green, supra, represented a marked extension of the principles of *Brown* v. *Board of Education, supra.* The Court in *Green* said:

> "It is of course true that for the time immediately after *Brown II* [349 U. S. 294] the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. . . . Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about . . . ." 391 U. S., at 435–436. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise

> which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Id.*, at 437–438.

The drastic extension of *Brown* which *Green* represented was barely, if at all, explicated in the latter opinion. To require that a genuinely "dual" system be disestablished, in the sense that the assignment of a child to a particular school is not made to depend on his race, is one thing. To require that school boards affirmatively undertake to achieve racial mixing in schools where such mixing is not achieved in sufficient degree by neutrally drawn boundary lines is quite obviously something else.

The Court's own language in *Green* makes it unmistakably clear that this significant extension of *Brown*'s prohibition against discrimination, and the conversion of that prohibition into an affirmative duty to integrate, was made in the context of a school system which had for a number of years rigidly excluded Negroes from attending the same schools as were attended by whites. Whatever may be the soundness of that decision in the context of a genuinely "dual" school system, where segregation of the races had once been mandated by law, I can see no constitutional justification for it in a situation such as that which the record shows to have obtained in Denver.

II

The Court's opinion gives lip service to the notion that the inquiry as to whether or not the Denver school district was "segregated" is a factual one, though it refers

in various critical language to the District Court's refusal to find that minority concentration in the core area schools was the result of discriminatory action on the part of the school board. The District Court is said to have "fractionated" the district, *ante,* at 193, and to have "held that its finding of intentional segregation in Park Hill was not in any sense material to the question of segregative intent in other areas of the city," *ibid.* It is difficult to know what the Court means by the first of these references, and even more difficult to justify the second in the light of the District Court's opinion.

If by "fractionating" the district, the Court means that the District Court treated together events that occurred during the same time period, and that it treated those events separately from events that occurred during another time span, this is undoubtedly correct. This is the approach followed by most experienced and careful finders of fact.

In commencing that part of its comprehensive opinion which dealt with the "core area" schools, the District Court observed:

> "The evidentiary as well as the legal approach to the remaining schools is quite different from that which has been outlined above. *For one thing, the concentrations of minorities occurred at an earlier date* and, in some instances, prior to the *Brown* decision by the Supreme Court. Community attitudes were different, including the attitudes of the School Board members. *Furthermore, the transitions were much more gradual and less perceptible than they were in the Park Hill schools.*" 313 F. Supp. 61, 69. (Emphasis supplied.)

The District Court noted, in its opinion of July 31, 1969, the differentiation that the plaintiffs themselves had made between the so-called "Park Hill" schools and

the "core area" schools. The plaintiffs had sought a preliminary injunction prohibiting the school board from rescinding three resolutions which had been adopted by a differently composed school board earlier in 1969 and which would have redrawn school boundary lines in the Park Hill area to achieve greater integration. In its opinion granting that injunction, the District Court said:

> "Attention at this hearing has focused primarily on the schools in northeast Denver, and particularly on the area which is commonly called Park Hill. The alleged segregated schools, elementary and junior high schools in this area, have acquired their character as such during the past ten years. The primary reason for this has been the migration of the Negro community eastward from a confined community surrounding what is commonly called 'Five Points.' Before 1950 the Negroes all lived in a community bounded roughly by 20th Avenue on the south, 20th Street on the west, York Street on the east, and 38th Avenue on the north. The schools in this area were, and are now, largely Negro schools. However, we are not presently concerned with the validity of this condition. During this period the Negro population was relatively small, and this condition had developed over a long period of time. However, by 1960 and, indeed, at the present time this population is sizeable. As the population has expanded the move has been to the east, first to Colorado Boulevard, a natural dividing line, and later beyond Colorado Boulevard, but within a narrow corridor—more or less fixed north-south boundaries. The migration caused these areas to become substantially Negro and segregated." 303 F. Supp. 279, 282.

Further reference to the District Court's several opin-

ions shows that the allegedly discriminatory acts of the School Board in the Park Hill area occurred between 1960 and 1969, in the context of a steadily expanding Negro school population in the Park Hill area and heightened sensitivity on the part of the community to the problems raised by integration and segregation.

The allegedly discriminatory acts with respect to the "core area" schools—New Manual High School, Cole Junior High School, Morey Junior High School, and Boulevard and Columbine Elementary Schools—took place between the years 1952 and 1961. They took place, as indicated by the references to the District Court's opinion noted above, not in a context of a rapidly expanding Negro population, but in a context of a relatively fixed area of the city that had for an indefinite period of time been predominantly Negro.

Thus, quite contrary to the intimation of virtual arbitrariness contained in the Court's opinion, the District Court's separate treatment of the claims respecting these two separate areas was absolutely necessary if a careful factual determination, rather than a jumbled hash of unrelated events, was to emerge from the fact-finding process. The "intent" with which a public body performs an official act is difficult enough to ascertain under the most favorable circumstances. See *Palmer* v. *Thompson*, 403 U. S. 217 (1971); *McGinnis* v. *Royster*, 410 U. S. 263 (1973). Far greater difficulty is encountered if we are to assess the intentions with which official acts of a school board are performed over a period of years. Not only does the board consist of a number of members, but the membership customarily turns over as a result of frequent periodic elections. Indeed, it was as a result of the 1969 election for membership on the Denver School Board that the Board's policy which had previously favored the correction of racial imbalance by

implementation of resolutions was reversed by the election of new members to the Board.

These difficulties obviously do not mean that the inquiry must be abandoned, but they do suggest that the care with which the District Court conducted it in this case is an absolutely essential ingredient to its successful conclusion.

The Court's bald statement that the District Court "held that its finding of intentional segregation in Park Hill was not in any sense material to the question of segregative intent in other areas of the city" is flatly belied by the following statement in the District Court's opinion:

> "Although past discriminatory acts may not be a substantial factor contributing to present segregation, they may nevertheless be probative on the issue of the segregative purpose of other discriminatory acts which are in fact a substantial factor in causing a present segregated situation." 313 F. Supp., at 74–75, n. 18.

Thus, it is apparent that the District Court was fully aware that it might take into consideration the intention with which it found the School Board to have performed one act in assessing its intention in performing another act. This is the most that the references in the Court's opinion to evidentiary treatises such as Wigmore and McCormick support. And it should be noted that the cases cited by the Court, and by the authors of the treatises, almost invariably deal with the intention of a particular individual or individuals, and not with the "intention" of a public body whose membership is constantly changing.

The Court's opinion totally confuses the concept of a permissible inference in such a situation, of which the District Court indicated it was well aware, with what

the Court calls a "presumption," which apparently "shifts . . . the burden of proving" to the defendant school authority. No case from this Court has ever gone further in this area than to suggest that a finding of intent in one factual situation may support a finding of fact in another related factual situation involving the same factor, a principle with which, as indicated above, the District Court was thoroughly familiar.

The District Court cases cited by the Court represent almost entirely the opinions of judges who were themselves finders of fact, concluding as a part of the fact-finding process that intent with respect to one act may support a conclusion of a like intent with respect to another. This is but a restatement of the principle of which the District Court showed it was aware. And, obviously, opinions of courts of appeals upholding such findings of the District Court do not themselves support any broader proposition than do the opinions of the District Court in question.

Chambers v. *Hendersonville City Board of Education,* 364 F. 2d 189 (CA4 1966), and *North Carolina Teachers Assn.* v. *Asheboro City Board of Education,* 393 F. 2d 736 (CA4 1968), involved a background of segregation by a law in the State of North Carolina and "the failure of the public school system to desegregate in compliance with the mandate of *Brown* until forced to do so by litigation." 364 F. 2d, at 192. The courts held that the decimation in the ranks of the Negro teachers while white teachers were unaffected, raised an inference of discrimination which cast upon the school board the burden of justifying such decimation. In each case, the school board had offered virtually no evidence supporting any nondiscriminatory basis for the result reached. The cases are thus wholly different in their factual background from the case now before the Court.

Also worthy of note is the fact that neither in *Chambers* nor in *Asheboro* did the Court of Appeals remand for a further hearing, but in effect ordered judgments for the appellants on the issues considered. This amounted to a determination that the factual finding of the District Court on that issue was "clearly erroneous," and the statement as to presumption was a statement as to the appellate court's method of evaluating the factual finding. This Court is in quite a different position in reviewing this case, with the factual finding of the District Court having been affirmed by the Court of Appeals for the Tenth Circuit, than was the Court of Appeals for the Fourth Circuit in reviewing the factual findings of the District Courts that were before it in *Chambers* and in *Asheboro*. Indeed, it would be contrary to settled principles for this Court to upset a factual finding sustained by the Court of Appeals. "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214 (1948).

The Court, doubtless realizing the difficulty of justifying an outright reversal, instead remands for further factual determination under newly enunciated standards governing the evidentiary treatment of the finding as to Park Hill by the District Court. These standards call in some parts of the opinion for establishing a presumption, in other parts for shifting the burden of proof, and in other parts for recognizing a prima facie case. Quite apart from my disagreement with the majority on its constitutional law, I cannot believe it is a service to any of the parties to this litigation to require further factual determination under such a vague and imprecise mandate. But, more fundamentally, I believe that a District Judge thoroughly sympathetic to the plaintiffs' claims gave them the full evidentiary hearing to which

they were entitled and carefully considered all of the evidence before him. He showed full awareness of the evidentiary principle that he might infer from the "segregative intent" with which he found the Board to have acted in the Park Hill area a like intent with respect to the core area, but he deliberately declined to do so. This was his prerogative as the finder of fact, and his conclusion upon its affirmance by the Court of Appeals is binding upon us.

III

The Court has taken a long leap in this area of constitutional law in equating the district-wide consequences of gerrymandering individual attendance zones in a district where separation of the races was never required by law with statutes or ordinances in other jurisdictions which did so require. It then adds to this potpourri a confusing enunciation of evidentiary rules in order to make it more likely that the trial court will on remand reach the result which the Court apparently wants it to reach. Since I believe neither of these steps is justified by prior decisions of this Court, I dissent.

ALMEIDA-SANCHEZ *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-6278. Argued March 19 and 28, 1973—
Decided June 21, 1973

Petitioner, a Mexican citizen and holder of a valid work permit, challenges the constitutionality of the Border Patrol's warrantless search of his automobile 25 air miles north of the Mexican border. The search, made without probable cause or consent, uncovered marihuana, which was used to convict petitioner of a federal crime. The Government seeks to justify the search on the basis of § 287 (a) (3) of the Immigration and Nationality Act, which provides for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States," as authorized by regulations to be promulgated by the Attorney General. The Attorney General's regulation defines "reasonable distance" as "within 100 air miles from any external boundary of the United States." The Court of Appeals upheld the search on the basis of the Act and regulation. *Held:* The warrantless search of petitioner's automobile, made without probable cause or consent, violated the Fourth Amendment. Pp. 269-275.

(a) The search cannot be justified on the basis of any special rules applicable to automobile searches, as probable cause was lacking; nor can it be justified by analogy with administrative inspections, as the officers had no warrant or reason to believe that petitioner had crossed the border or committed an offense, and there was no consent by petitioner. Pp. 269-272.

(b) The search was not a border search or the functional equivalent thereof. Pp. 272-275.

452 F. 2d 459, reversed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 275. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 285.

James A. Chanoux, and *John J. Cleary* by appointment of the Court, 411 U. S. 903, argued the cause for petitioner. *Mr. Chanoux* was on the brief.

Deputy Solicitor General Lacovara argued the cause for the United States. With him on the brief were *Solicitor General Griswold, Assistant Attorney General Petersen, Mark L. Evans, Beatrice Rosenberg*, and *Roger A. Pauley.**

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner in this case, a Mexican citizen holding a valid United States work permit, was convicted of having knowingly received, concealed, and facilitated the transportation of a large quantity of illegally imported marihuana in violation of 21 U. S. C. § 176a (1964 ed.). His sole contention on appeal was that the search of his automobile that uncovered the marihuana was unconstitutional under the Fourth Amendment and that, under the rule of *Weeks* v. *United States*, 232 U. S. 383, the marihuana should not have been admitted as evidence against him.

The basic facts in the case are neither complicated nor disputed. The petitioner was stopped by the United States Border Patrol on State Highway 78 in California, and his car was thoroughly searched. The road is essentially an east-west highway that runs for part of its course through an undeveloped region. At about the point where the petitioner was stopped the road meanders north as well as east—but nowhere does the road reach the Mexican border, and at all points it lies north of U. S. 80, a major east-west highway entirely within the

**Luke McKissack* filed a brief as *amicus curiae* urging reversal. *Arthur Wells, Jr.*, filed a brief for Gilbert Foerster as *amicus curiae*.

United States that connects the Southwest with the west coast. The petitioner was some 25 air miles north of the border when he was stopped. It is undenied that the Border Patrol had no search warrant, and that there was no probable cause of any kind for the stop or the subsequent search—not even the "reasonable suspicion" found sufficient for a street detention and weapons search in *Terry* v. *Ohio*, 392 U. S. 1, and *Adams* v. *Williams*, 407 U. S. 143.

The Border Patrol conducts three types of surveillance along inland roadways, all in the asserted interest of detecting the illegal importation of aliens. Permanent checkpoints are maintained at certain nodal intersections; temporary checkpoints are established from time to time at various places; and finally, there are roving patrols such as the one that stopped and searched the petitioner's car. In all of these operations, it is argued, the agents are acting within the Constitution when they stop and search automobiles without a warrant, without probable cause to believe the cars contain aliens, and even without probable cause to believe the cars have made a border crossing. The only asserted justification for this extravagant license to search is § 287 (a)(3) of the Immigration and Nationality Act, 66 Stat. 233, 8 U. S. C. § 1357 (a)(3), which simply provides for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States," as authorized by regulations to be promulgated by the Attorney General. The Attorney General's regulation, 8 CFR § 287.1, defines "reasonable distance" as "within 100 air miles from any external boundary of the United States."

The Court of Appeals for the Ninth Circuit recognized that the search of petitioner's automobile was not a "border search," but upheld its validity on the basis of

the above-mentioned portion of the Immigration and Nationality Act and the accompanying regulation. 452 F. 2d 459, 461. We granted certiorari, 406 U. S. 944, to consider the constitutionality of the search.

I

No claim is made, nor could one be, that the search of the petitioner's car was constitutional under any previous decision of this Court involving the search of an automobile. It is settled, of course, that a stop and search of a moving automobile can be made without a warrant. That narrow exception to the warrant requirement was first established in *Carroll* v. *United States*, 267 U. S. 132. The Court in *Carroll* approved a portion of the Volstead Act providing for warrantless searches of automobiles when there was probable cause to believe they contained illegal alcoholic beverages. The Court recognized that a moving automobile on the open road presents a situation "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.*, at 153. *Carroll* has been followed in a line of subsequent cases,[1] but the *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search.[2] As MR. JUSTICE WHITE wrote for the Court in *Chambers* v. *Maroney*, 399

[1] *E. g.*, *Chambers* v. *Maroney*, 399 U. S. 42; *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216; *Brinegar* v. *United States*, 338 U. S. 160; *Husty* v. *United States*, 282 U. S. 694.

[2] Moreover, "[n]either *Carroll*, *supra*, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords." *Chambers* v. *Maroney*, *supra*, at 50. See also *Coolidge* v. *New Hampshire*, 403 U. S. 443, 458–464.

U. S. 42, 51: "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution."

In seeking a rationale for the validity of the search in this case, the Government thus understandably sidesteps the automobile search cases. Instead, the Government relies heavily on cases dealing with administrative inspections. But these cases fail to support the constitutionality of this search.

In *Camara* v. *Municipal Court*, 387 U. S. 523, the Court held that administrative inspections to enforce community health and welfare regulations could be made on less than probable cause to believe that particular dwellings were the sites of particular violations. *Id.*, at 534–536, 538. Yet the Court insisted that the inspector obtain either consent or a warrant supported by particular physical and demographic characteristics of the areas to be searched. *Ibid.* See also *See* v. *City of Seattle*, 387 U. S. 541. The search in the present case was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant,[3] probable cause, or consent. The search thus embodied precisely the evil the Court saw in *Camara* when it insisted that the "discretion of the official in the field" be circumscribed by obtaining a warrant prior to the inspection. *Camara, supra*, at 532–533.

Two other administrative inspection cases relied upon by the Government are equally inapposite. *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72, and *United States* v. *Biswell*, 406 U. S. 311, both approved

[3] The Justices who join this opinion are divided upon the question of the constitutionality of area search warrants such as described in MR. JUSTICE POWELL's concurring opinion.

warrantless inspections of commercial enterprises engaged in businesses closely regulated and licensed by the Government. In *Colonnade,* the Court stressed the long history of federal regulation and taxation of the manufacture and sale of liquor, 397 U. S., at 76–77. In *Biswell,* the Court noted the pervasive system of regulation and reporting imposed on licensed gun dealers, 406 U. S., at 312 n. 1, 315–316.

A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him. As the Court stated in *Biswell:*

> "It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority. . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task." *Id.,* at 316.

Moreover, in *Colonnade* and *Biswell,* the searching officers knew with certainty that the premises searched were in fact utilized for the sale of liquor or guns. In the present case, by contrast, there was no such assurance that the individual searched was within the proper scope of official scrutiny—that is, there was no reason

whatever to believe that he or his automobile had even crossed the border, much less that he was guilty of the commission of an offense.

II

Since neither this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case, we are left simply with the statute that purports to authorize automobiles to be stopped and searched, without a warrant and "within a reasonable distance from any external boundary of the United States." It is clear, of course, that no Act of Congress can authorize a violation of the Constitution. But under familiar principles of constitutional adjudication, our duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 348 (Brandeis, J., concurring).

It is undoubtedly within the power of the Federal Government to exclude aliens from the country. *Chae Chan Ping* v. *United States,* 130 U. S. 581, 603–604. It is also without doubt that this power can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders. As the Court stated in *Carroll* v. *United States:* "Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." 267 U. S., at 154. See also *Boyd* v. *United States,* 116 U. S. 616.

Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well. For

example, searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.[4]

But the search of the petitioner's automobile by a roving patrol, on a California road that lies at all points at least 20 miles north of the Mexican border,[5] was of a wholly different sort. In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of "unreasonable searches and seizures."

It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards. It

[4] With respect to aircraft, 8 CFR § 281.1 defines "reasonable distance" as "any distance fixed pursuant to paragraph (b) of this section." Paragraph (b) authorizes the Commissioner of Immigration and Naturalization to approve searches at a greater distance than 100 air miles from a border "because of unusual circumstances."

[5] The Government represents that the highway on which this search occurred is a common route for illegally entered aliens to travel, and that roving patrols apprehended 195 aliens on that road in one year. But it is, of course, quite possible that every one of those aliens was apprehended as a result of a valid search made upon probable cause. On the other hand, there is no telling how many perfectly innocent drivers have been stopped on this road without any probable cause, and been subjected to a search in the trunks, under the hoods, and behind the rear seats of their automobiles.

is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials:

> "These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar* v. *United States*, 338 U. S. 160, 180 (Jackson, J., dissenting).

The Court that decided *Carroll* v. *United States*, *supra*, sat during a period in our history when the Nation was confronted with a law enforcement problem of no small magnitude—the enforcement of the Prohibition laws. But that Court resisted the pressure of official expedience against the guarantee of the Fourth Amendment. Mr. Chief Justice Taft's opinion for the Court distinguished between searches at the border and in the interior, and clearly controls the case at bar:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is

known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." 267 U. S., at 153–154.

Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE POWELL, concurring.

While I join the opinion of the Court, which sufficiently establishes that none of our Fourth Amendment decisions supports the search conducted in this case, I add this concurring opinion to elaborate on my views as to the meaning of the Fourth Amendment in this context. We are confronted here with the all-too-familiar necessity of reconciling a legitimate need of government with constitutionally protected rights. There can be no question as to the seriousness and legitimacy of the law enforcement problem with respect to enforcing along thousands of miles of open border valid immigration and related laws. Nor can there be any question as to the necessity, in our free society, of safeguarding persons against searches and seizures proscribed by the Fourth Amendment. I believe that a resolution of the issue raised by this case is possible with due recognition of both of these interests, and in a manner compatible with the prior decisions of this Court.[1]

I

The search here involved was carried out as part of a roving search of automobiles in an area generally proximate to the Mexican border. It was not a border search,

[1] I am in accord with the Court's conclusion that nothing in § 287 (a) (3) of the Immigration and Nationality Act, 8 U. S. C. § 1357 (a) (3), or in 8 CFR § 287.1 serves to authorize an otherwise unconstitutional search.

nor can it fairly be said to have been a search conducted at the "functional equivalent" of the border. Nor does this case involve the constitutional propriety of searches at permanent or temporary checkpoints removed from the border or its functional equivalent. Nor, finally, was the search based on cause in the ordinary sense of specific knowledge concerning an automobile or its passengers.[2] The question posed, rather, is whether and under what circumstances the Border Patrol may lawfully conduct roving searches of automobiles in areas not far removed from the border for the purpose of apprehending aliens illegally entering or in the country.

The Government has made a convincing showing that large numbers of aliens cross our borders illegally at places other than established crossing points, that they are often assisted by smugglers, that even those who cross on foot are met and transported to their destinations by automobiles, and that roving checks of automobiles are the only feasible means of apprehending them. It would, of course, be wholly impracticable to maintain a constant patrol along thousands of miles of border. Moreover, because many of these aliens cross the border on foot, or at places other than established checkpoints, it is simply not possible in most cases for the Government to obtain specific knowledge that a person riding or stowed in an automobile is an alien illegally in the coun-

[2] The Solicitor General's brief in this Court states explicitly that "We . . . do not take the position that the checking operations are justified because the officers have probable cause or even 'reasonable suspicion' to believe, with respect to each vehicle checked, that it contains an illegal alien. Apart from the reasonableness of establishment of the checking operation in this case, there is nothing in the record to indicate that the Border Patrol officers had any special or particular reason to stop petitioner and examine his car." Brief for the United States 9–10.

try. Thus the magnitude of the problem is clear. An answer, reconciling the obvious needs of law enforcement with relevant constitutional rights, is far less clear.

II

The Government's argument to sustain the search here is simply that it was reasonable under the circumstances. But it is by now axiomatic that the Fourth Amendment's proscription of "unreasonable searches and seizures" is to be read in conjunction with its command that "no Warrants shall issue, but upon probable cause." Under our cases, both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, though in certain limited circumstances neither is required.

Before deciding whether a warrant is required, I will first address the threshold question of whether some functional equivalent of probable cause may exist for the type of search conducted in this case. The problem of ascertaining the meaning of the probable-cause requirement in the context of roving searches of the sort conducted here is measurably assisted by the Court's opinion in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), on which the Government relies heavily. The Court was there concerned with the nature of the probable-cause requirement in the context of searches to identify housing code violations and was persuaded that the only workable method of enforcement was periodic inspection of all structures:

> "It is here that the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building." *Id.*, at 536.

In concluding that such general knowledge met the probable-cause requirement under those circumstances, the Court took note of a "long history of judicial and public acceptance," of the absence of other methods for vindicating the public interest in preventing or abating dangerous conditions, and of the limited invasion of privacy occasioned by administrative inspections which are "neither personal in nature nor aimed at the discovery of evidence of crime." *Id.*, at 537.

Roving automobile searches in border regions for aliens, likewise, have been consistently approved by the judiciary. While the question is one of first impression in this Court, such searches uniformly have been sustained by the courts of appeals whose jurisdictions include those areas of the border between Mexico and the United States where the problem has been most severe. See, *e. g.*, *United States* v. *Miranda*, 426 F. 2d 283 (CA9 1970); *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206 (CA10 1969). Moreover, as noted above, no alternative solution is reasonably possible.

The Government further argues that such searches resemble those conducted in *Camara* in that they are undertaken primarily for administrative rather than prosecutorial purposes, that their function is simply to locate those who are illegally here and to deport them. Brief for the United States 28 n. 25. This argument is supported by the assertion that only 3% of aliens apprehended in this country are prosecuted. While the low rate of prosecution offers no great solace to the innocent whose automobiles are searched or to the few who are prosecuted, it does serve to differentiate this class of searches from random area searches which are no more than "fishing expeditions" for evidence to support prosecutions. The possibility of prosecution does not distinguish such searches from those involved in *Camara*. Despite the Court's assertion in that case that the searches

were not "aimed at the discovery of evidence of crime," 387 U. S., at 537, violators of the housing code there were subject to criminal penalties. *Id.*, at 527 n. 2.

Of perhaps greater weight is the fact that these searches, according to the Government, are conducted in areas where the concentration of illegally present aliens is high, both in absolute terms and in proportion to the number of persons legally present. While these searches are not border searches in the conventional sense, they are incidental to the protection of the border and draw a large measure of justification from the Government's extraordinary responsibilities and powers with respect to the border. Finally, and significantly, these are searches of automobiles rather than searches of persons or buildings. The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building. This Court "has long distinguished between an automobile and a home or office." *Chambers* v. *Maroney*, 399 U. S. 42, 48 (1970). As the Government has demonstrated, and as those in the affected areas surely know, it is the automobile which in most cases makes effective the attempts to smuggle aliens into this country.

The conjunction of these factors—consistent judicial approval, absence of a reasonable alternative for the solution of a serious problem, and only a modest intrusion on those whose automobiles are searched—persuades me that under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas.

III

The conclusion that there may be probable cause to conduct roving searches does not end the inquiry, for "except in certain carefully defined classes of cases, a search of private property without proper consent is

'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court, supra,* at 528–529. I expressed the view last Term that the warrant clause reflects an important policy determination: "The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute. . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *United States* v. *United States District Court,* 407 U. S. 297, 317 (1972). See also *Coolidge* v. *New Hampshire,* 403 U. S. 443, 481 (1971); *Chimel* v. *California,* 395 U. S. 752, 763–764 (1969).

To justify warrantless searches in circumstances like those presented in this case, the Government relies upon several of this Court's decisions recognizing exceptions to the warrant requirement. A brief review of the nature of each of these major exceptions illuminates the relevant considerations in the present case. In *Terry* v. *Ohio,* 392 U. S. 1 (1968), the Court held that a policeman may conduct a limited "pat down" search for weapons when he has reasonable grounds for believing that criminal conduct has taken or is taking place and that the person he searches is armed and dangerous. "The sole justification [for such a] search . . . is the protection of the police officer and others nearby . . . ." *Id.,* at 29. Nothing in *Terry* supports an exception to the warrant requirement here.

Colonnade Catering Corp. v. *United States,* 397 U. S. 72 (1970), and *United States* v. *Biswell,* 406 U. S. 311 (1972), on which the Government also relies, both concerned the standards which govern inspections of the business premises of those with federal licenses to engage in the sale of liquor, *Colonnade,* or the sale of guns,

Biswell. In those cases, Congress was held to have power to authorize warrantless searches. As the Court stated in *Biswell:*

> "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." 406 U. S., at 316.

Colonnade and *Biswell* cannot fairly be read to cover cases of the present type. One who merely travels in regions near the borders of the country can hardly be thought to have submitted to inspections in exchange for a special perquisite.

More closely in point on their facts are the cases involving automobile searches. *E. g., Carroll* v. *United States,* 267 U. S. 132 (1925); *Chambers* v. *Maroney, supra; Coolidge* v. *New Hampshire, supra.* But while those cases allow automobiles to be searched without a warrant in certain circumstances, the principal rationale for this exception to the warrant clause is that under those circumstances "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll* v. *United States, supra,* at 153. The Court today correctly points out that a warrantless search under the *Carroll* line of cases must be supported by probable cause in the sense of specific knowledge about a particular automobile. While, as indicated above, my view is that on appropriate facts the Government can satisfy the probable cause requirement for a roving search in a border area without possessing information about particular automobiles, it does not follow that the warrant requirement is inapposite. The very fact that the Government's supporting information relates to criminal activity in certain areas rather than

to evidence about a particular automobile renders irrelevant the justification for warrantless searches relied upon in *Carroll* and its progeny. Quite simply, the roving searches are justified by experience with obviously nonmobile sections of a particular road or area embracing several roads.

None of the foregoing exceptions to the warrant requirement, then, applies to roving automobile searches in border areas. Moreover, the propriety of the warrant procedure here is affirmatively established by *Camara*. See also *See* v. *City of Seattle*, 387 U. S. 541 (1967). For the reasons outlined above, the Court there ruled that probable cause could be shown for an area search, but nonetheless required that a warrant be obtained for unconsented searches. The Court indicated its general approach to exceptions to the warrant requirement:

> "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara* v. *Municipal Court, supra,* at 533.

See also *United States* v. *United States District Court, supra,* at 315.

The Government argues that *Camara* and *See* are distinguishable from the present case for the purposes of the warrant requirement. It is true that while a building inspector who is refused admission to a building may easily obtain a warrant to search that building, a member of the Border Patrol has no such opportunity when

he is refused permission to inspect an automobile. It is also true that the judicial function envisioned in *Camara* did not extend to reconsideration of "the basic agency decision to canvass an area," *Camara* v. *Municipal Court, supra,* at 532, while the judicial function here would necessarily include passing on just such a basic decision.

But it does not follow from these distinctions that "no warrant system can be constructed that would be feasible and meaningful." Brief for the United States 36. Nothing in the papers before us demonstrates that it would not be feasible for the Border Patrol to obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time.[3] According to the Government, the incidence of illegal transportation of aliens on certain roads is predictable, and the roving searches are apparently planned in advance or carried out according to a predetermined schedule. The use of an area warrant procedure would surely not "frustrate the governmental purpose behind the search." *Camara* v. *Municipal Court, supra,* at 533. It would of course entail some inconvenience, but inconvenience alone has never been thought to be an adequate reason for abrogating the warrant requirement. *E. g., United States* v. *United States District Court, supra,* at 321.

Although standards for probable cause in the context of this case are relatively unstructured (cf. *id.,* at 322), there are a number of relevant factors which would merit consideration: they include (i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area;

[3] There is no reason why a judicial officer could not approve where appropriate a series of roving searches over the course of several days or weeks. Experience with an initial search or series of searches would be highly relevant in considering applications for renewal of a warrant.

(ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use,[4] and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.

In short, the determination of whether a warrant should be issued for an area search involves a balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights. This presents the type of delicate question of constitutional judgment which ought to be resolved by the Judiciary rather than the Executive. In the words of *Camara,*

> "This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." 387 U. S., at 532–533.

Nor does the novelty of the problem posed by roving searches in border areas undermine the importance of a prior judicial determination. When faced with a similarly unconventional problem last Term in *United States District Court, supra,* we recognized that the focus of the search there involved was "less precise than that directed against more conventional types of crime," and that "[d]ifferent standards may be compatible with the Fourth Amendment if they are reasonable both in rela-

[4] Depending upon the circumstances, there may be probable cause for the search to be authorized only for a designated portion of a particular road or such cause may exist for a designated area which may contain one or more roads or tracks. Particularly along much of the Mexican border, there are vast areas of uninhabited desert and arid land which are traversed by few, if any, main roads or highways, but which nevertheless may afford opportunities—by virtue of their isolated character—for the smuggling of aliens.

tion to the legitimate need of Government . . . and the protected rights of our citizens." 407 U. S., at 322–323. Yet we refused to abandon the Fourth Amendment commitment to the use of search warrants whenever this is feasible with due regard to the interests affected.

For the reasons stated above, I think a rational search warrant procedure is feasible in cases of this kind. As no warrant was obtained here, I agree that the judgment must be reversed. I express no opinion as to whether there was probable cause to issue a warrant on the facts of this particular case.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

Trial and conviction in this case were in the United States District Court for the Southern District of California under an indictment charging that petitioner, contrary to 21 U. S. C. § 176a (1964 ed.), had knowingly received, concealed, and facilitated the transportation of approximately 161 pounds of illegally imported marihuana. He was sentenced to five years' imprisonment. He appealed on the sole ground that the District Court had erroneously denied his motion to suppress marihuana allegedly seized from his automobile in violation of the Fourth Amendment.

The motion to suppress was heard on stipulated evidence in the District Court.[1] United States Border Patrol Officers Shaw and Carrasco stopped petitioner's car shortly after midnight as it was traveling from Calexico, on the California-Mexico border, toward Blythe, Cali-

[1] The facts, except for when petitioner was stopped, are taken from the oral stipulation in open court. See App. 11–14. The time petitioner was stopped is given by the Complaint as 12:15 a. m., App. 4, while petitioner testified at trial that he was "stopped about 1:00." 3 Tr. of Rec. 62.

fornia. The stop was made on Highway 78 near Glamis, California, 50 miles by road from Calexico. The highway was "about the only north-south road in California coming from the Mexican border that does not have an established checkpoint." [2] Because of that, "it is commonly used to evade check points by both marijuana and alien smugglers." On occasions "but not at all times," officers of the Border Patrol "maintain a roving check of vehicles and persons on that particular highway." Pursuant to this practice "they stopped this vehicle for the specific purpose of checking for aliens." Petitioner's identification revealed that he was a resident of Mexicali, Mexico, but that he held a work permit for the United States. Petitioner had come from Mexicali, had picked up the car in Calexico and was on his way to Blythe to deliver it. He intended to return to Mexicali by bus.[3] The officers had been advised by an official bulletin that aliens illegally entering the United States sometimes concealed themselves by sitting upright behind the back seat rest of a car, with their legs folded under the back seat from which the springs had been removed. While looking under the rear seat of petitioner's car for aliens, the officers discovered packages believed by them to contain marihuana. Petitioner was placed under arrest and advised of his rights. His car was then searched for additional marihuana, which was found in substantial amounts.

On this evidence, the motion to suppress was denied,

[2] West of Glamis the prevailing direction of the highway is east-west. At the point of the stop west of Glamis, the highway is only approximately 20 miles north of the border, running parallel to it. East of Glamis, the highway proceeds sharply northeast to Blythe, a distance of over 50 miles.

[3] It appears, see App. 12, 13, that the officers were informed of these facts before initiating any search for aliens, and hence before finding any contraband.

and petitioner was convicted. A divided Court of Appeals affirmed, 452 F. 2d 459 (CA9 1971), relying on its prior cases and on § 287 (a)(3) of the Immigration and Nationality Act, 8 U. S. C. § 1357 (a)(3), which provides that officers of the Immigration and Naturalization Service shall have the power, without warrant, to search any vehicle for aliens within a reasonable distance from any external boundary of the United States.[4] I dissent from the reversal of this judgment.

I

The Fourth Amendment protects the people "in their persons, houses, papers, and effects, against unreasonable searches and seizures" and also provides that "no Warrants shall issue, but upon probable cause . . . ." The ordinary rule is that to be reasonable under the Amendment a search must be authorized by warrant issued by a magistrate upon a showing of probable cause. The

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[4] Title 8 U. S. C. § 1357 (a) provides in pertinent part:

"Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

. . . . . .

"(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States . . . ."

The Court of Appeals also relied on 8 CFR § 287.1, which in relevant part provides:

"(a)(2) *Reasonable distance.* The term 'reasonable distance,' as used in section 287 (a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section."

Amendment's overriding prohibition is nevertheless against "unreasonable" searches and seizures; and the legality of searching, without warrant and without probable cause, individuals and conveyances seeking to enter the country has been recognized by Congress and the courts since the very beginning. *Boyd* v. *United States*, 116 U. S. 616 (1886), said as much; and in *Carroll* v. *United States*, 267 U. S. 132, 154 (1925), the Court repeated that neither warrant nor probable cause was required to authorize a stop and search at the external boundaries of the United States: "Travelers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." This much is undisputed in this case. Persons and their effects may be searched at the border for dutiable articles or contraband. Conveyances may be searched for the same purposes, as well as to determine whether they carry aliens not entitled to enter the country. Neither, apparently, is it disputed that warrantless searches for aliens without probable cause may be made at fixed checkpoints away from the border.

The problem in this case centers on the roving patrol operating away from, but near, the border. These patrols may search for aliens without a warrant if there is probable cause to believe that the vehicle searched is carrying aliens illegally into the country. But without probable cause, the majority holds the search unreasonable, although at least one Justice, MR. JUSTICE POWELL, would uphold searches by roving patrols if authorized by an area warrant issued on less than probable cause in the traditional sense. I agree with MR. JUSTICE POWELL that such a warrant so issued would satisfy the Fourth Amendment, and I would expect that such warrants would be readily issued. But I disagree with him

and the majority that either a warrant or probable cause is required in the circumstances of this case. As the Court has reaffirmed today in *Cady* v. *Dombrowski, post,* p. 433, the governing standard under the Fourth Amendment is reasonableness, and in my view, that standard is sufficiently flexible to authorize the search involved in this case.

In *Terry* v. *Ohio,* 392 U. S. 1 (1968), the Court proceeding under the "general proscription against unreasonable searches and seizures," *id.,* at 20 (footnote omitted), weighed the governmental interest claimed to justify the official intrusion against the constitutionally protected interest of the private citizen. *Id.,* at 20–21. The " 'need to search' " was balanced " 'against the invasion which the search . . . entails,' " quoting from *Camara* v. *Municipal Court,* 387 U. S. 523, 534–535, 536–537 (1967). *Terry, supra,* at 21. In any event, as put by Mr. Chief Justice Warren, the "question is whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an *unreasonable* search and seizure." *Id.,* at 9 (emphasis added).

Warrantless but probable-cause searches of the person and immediate surroundings have been deemed reasonable when incident to arrest, see *Chimel* v. *California,* 395 U. S. 752 (1969); and in *Terry,* the stop of a suspected individual and a pat-down for weapons without a warrant were thought reasonable on less than traditional probable cause. In *Camara* v. *Municipal Court, supra,* an inspection of every structure in an entire area to enforce the building codes was deemed reasonable under the Fourth Amendment without probable cause, or suspicion that any particular house or structure was in violation of law, although a warrant, issuable without probable cause, or reasonable suspicion of a violation, was required with respect to nonconsenting property owners. Also, in *Colonnade Catering Corp.* v. *United*

States, 397 U. S. 72 (1970), MR. JUSTICE DOUGLAS, writing for the Court and recognizing that the Fourth Amendment bars only unreasonable searches and seizures, ruled that the historic power of the Government to control the liquor traffic authorized warrantless inspections of licensed premises without probable cause, or reasonable suspicion, not to check on liquor quality or conditions under which it was sold, but solely to enforce the collection of the federal excise tax.[5] *United States* v. *Biswell*, 406 U. S. 311 (1972), involved the Gun Control Act of 1968 and its authorization to federal officers to inspect firearms dealers. The public need to enforce an important regulatory program was held to justify random inspections of licensed establishments without warrant and probable cause.

The Court has been particularly sensitive to the Amendment's broad standard of "reasonableness" where, as in *Biswell* and *Colonnade*, authorizing statutes permitted the challenged searches. We noted in *Colonnade* that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary

[5] In *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970), the conviction was set aside because it was thought that Congress, with all the authority it had to prescribe standards of reasonableness under the Fourth Amendment, had not intended federal inspectors to use force in carrying out warrantless, non-probable-cause inspections. In dissent, THE CHIEF JUSTICE, joined by Justices Black and STEWART, would have sustained the search, saying: "I assume we could all agree that the search in question must be held valid, and the contraband discovered subject to seizure and forfeiture, unless (a) it is 'unreasonable' under the Constitution or (b) it is prohibited by a statute imposing restraints apart from those in the Constitution. The majority sees no constitutional violation; I agree." *Id.*, at 78.

In a separate dissent Mr. Justice Black, joined by THE CHIEF JUSTICE and MR. JUSTICE STEWART, also emphasized that the ultimate test of legality under the Fourth Amendment was whether the search and seizure were reasonable. *Id.*, at 79–81.

to meet the evils at hand," 397 U. S., at 76; and in *Biswell* we relied heavily upon the congressional judgment that the authorized inspection procedures played an important part in the regulatory system. 406 U. S., at 315–317. In the case before us, 8 U. S. C. § 1357 (a)(3), authorizes Border Patrol officers, without warrant, to search any vehicle *for aliens* "within a reasonable distance from any external boundary of the United States" and within the distance of 25 miles from such external boundary to have access to private lands, but not dwellings "for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States . . . ." At the very least, this statute represents the considered judgment of Congress that proper enforcement of the immigration laws requires random searches of vehicles without warrant or probable cause within a reasonable distance of the international borders of the country.

It is true that "[u]ntil 1875 alien migration to the United States was unrestricted." *Kleindienst* v. *Mandel*, 408 U. S. 753, 761 (1972). But the power of the National Government to exclude aliens from the country is undoubted and sweeping. "That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." *Chae Chan Ping* v. *United States*, 130 U. S. 581, 603–604 (1889). "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively . . . is settled by our previous ad-

judications." *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547 (1895). See also *Fong Yue Ting* v. *United States*, 149 U. S. 698, 711 (1893); *Yamataya* v. *Fisher*, 189 U. S. 86, 97–99 (1903); *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 289–290 (1904); *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 335–336 (1909); *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 425 (1933).

Since 1875, Congress has given "almost continuous attention . . . to the problems of immigration and of excludability of certain defined classes of aliens. The pattern generally has been one of increasing control . . . ." *Kleindienst* v. *Mandel*, *supra*, at 761–762. It was only as the illegal entry of aliens multiplied that Congress addressed itself to enforcement mechanisms. In 1917, immigration authorities were authorized to board and search all conveyances by which aliens were being brought into the United States. Act of Feb. 5, 1917, § 16, 39 Stat. 886. This basic authority, substantially unchanged, is incorporated in 8 U. S. C. § 1225 (a).

In 1946, it was represented to Congress that "[i]n the enforcement of the immigration laws it is at times desirable to stop and search vehicles within a reasonable distance from the boundaries of the United States and the legal right to do so should be conferred by law." H. R. Rep. No. 186, 79th Cong., 1st Sess., 2 (1945). The House Committee on Immigration and Naturalization was "of the opinion that the legislation is highly desirable," *ibid.*, and its counterpart in the Senate, S. Rep. No. 632, 79th Cong., 1st Sess., 2 (1945), stated that "[t]here is no question but that this is a step in the right direction." The result was express statutory authority, Act of Aug. 7, 1946, 60 Stat. 865, to conduct searches of vehicles for aliens within a reasonable distance from the border without warrant or possible cause. Moreover, in the Immigration and Nationality Act of 1952, 66 Stat.

163, Congress permitted the entry onto private lands, excluding dwellings, within a distance of 25 miles from any external boundaries of the country "for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States . . . ." § 287 (a)(3), 66 Stat. 233.

The judgment of Congress obviously was that there are circumstances in which it is reasonably necessary, in the enforcement of the immigration laws, to search vehicles and other private property for aliens, without warrant or probable cause, and at locations other than at the border. To disagree with this legislative judgment is to invalidate 8 U. S. C. § 1357 (a)(3) in the face of the contrary opinion of Congress that its legislation comported with the standard of reasonableness of the Fourth Amendment. This I am quite unwilling to do.

The external boundaries of the United States are extensive. The Canadian border is almost 4,000 miles in length; the Mexican, almost 2,000. Surveillance is maintained over the established channels and routes of communication. But not only is inspection at regular points of entry not infallible, but it is also physically impossible to maintain continuous patrol over vast stretches of our borders. The fact is that illegal crossings at other than the legal ports of entry are numerous and recurring. If there is to be any hope of intercepting illegal entrants and of maintaining any kind of credible deterrent, it is essential that permanent or temporary checkpoints be maintained away from the borders, and roving patrols be conducted to discover and intercept illegal entrants as they filter to the established roads and highways and attempt to move away from the border area. It is for this purpose that the Border Patrol maintained the roving patrol involved in this case and conducted random, spot checks of automobiles and other vehicular traffic.

The United States in this case reports that in fiscal year 1972, Border Patrol traffic checking operations located over 39,000 deportable aliens, of whom approximately 30,000 had entered the United States by illegally crossing the border at a place other than a port of entry. This was said to represent nearly 10% of the number of such aliens located by the Border Patrol by all means throughout the United States.[6]

Section 1357 (a)(3) authorizes only searches for aliens and only searches of conveyances and other property. No searches of the person or for contraband are authorized by the section. The authority extended by the statute is limited to that reasonably necessary for the officer to assure himself that the vehicle or other conveyance is not carrying an alien who is illegally within this country; and more extensive searches of automobiles without probable cause are not permitted by the section. *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206 (CA10 1969); see *Fumagalli* v. *United States*, 429 F. 2d 1011, 1013 (CA9 1970). Guided by the principles of *Camara*, *Colonnade*, and *Biswell*, I cannot but uphold the judgment of Congress that for purposes of enforcing the immigration laws it is reasonable to treat the exterior boundaries of the country as a zone, not a line, and that there are recurring circumstances in which the search of vehicular traffic without warrant and without probable cause may be reasonable under the Fourth Amendment although not carried out at the border itself.

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[6] In fiscal year 1972, 398,000 aliens who had entered the United States without inspection were located by Immigration and Naturalization officers; and of the 39,243 deportable aliens located through traffic checking operations, about one-third, 11,586, had been assisted by smugglers. In fiscal year 1972, 2,880 such smugglers were discovered through traffic checking operations. Ninety-nine percent of all aliens illegally entering the United States by land crossed our border with Mexico.

This has also been the considered judgment of the three Courts of Appeals whose daily concern is the enforcement of the immigration laws along the Mexican-American border, and who, although as sensitive to constitutional commands as we are, perhaps have a better vantage point than we here on the Potomac to judge the practicalities of border-area law enforcement and the reasonableness of official searches of vehicles to enforce the immigration statutes.

The Court of Appeals for the Ninth Circuit, like other circuits, recognizes that at the border itself, persons may be stopped, identified, and searched without warrant or probable cause and their effects and conveyances likewise subjected to inspection. There seems to be no dissent on this proposition. Away from the border, persons and automobiles may be searched for narcotics or other contraband only on probable cause; but under § 1357 (a)(3), automobiles may be stopped without warrant or probable cause and a limited search for aliens carried out in those portions of the conveyance capable of concealing any illegal immigrant. This has been the consistent view of that court.

In *Fumagalli* v. *United States, supra,* Fumagalli was stopped at a checkpoint in Imperial, California, 49 miles north of the international boundary. In the course of looking in the trunk for an illegal entrant, the odor of marihuana was detected and marihuana discovered. Fumagalli contended that the trunk of the automobile could not be examined to locate an illegal entrant absent probable cause to believe that the vehicle carried such a person. The court, composed of Judges Merrill, Hufstedler, and Byrne, rejected the position, stating that "[w]hat all of these cases make clear is that probable cause is not required for an *immigration* search within approved limits [footnote omitted] but is generally required to sustain the legality of a search for *contraband*

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in a person's automobile conducted away from the international borders. . . . Appellant has confused the two rules in his attempt to graft the probable cause standards of the *narcotics* cases . . . onto the rules justifying immigration inspections . . . ." 429 F. 2d, at 1013. Among prior cases reaffirmed was *Fernandez* v. *United States*, 321 F. 2d 283 (1963), where an automobile was stopped 18 miles north of Oceanside, California, on Highway 101 at a point 60 to 70 miles north of the Mexican border. An inspection for illegally entering aliens was conducted, narcotics were discovered and seized, and the stop and seizure were sustained under the statute. The Immigration Service, it was noted, had been running traffic checks in this area for 31 years, many illegal entrants had been discovered there, and there were at least a dozen other such checkpoints operating along the border between the United States and Mexico.[7]

The Courts of Appeal for the Fifth and Tenth Circuits share the problem of enforcing the immigration laws along the Mexican-American border. Both courts agree with the Ninth Circuit that § 1357 (a)(3) is not void and that there are recurring circumstances where, as the statute permits, a stop of an automobile without warrant or probable cause and a search of it for aliens are constitutionally permissible.

In *United States* v. *De Leon*, 462 F. 2d 170 (CA5 1972), De Leon was stopped without warrant or probable cause,

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[7] In the Court of Appeals for the Ninth Circuit, 8 U. S. C. § 1357 (a)(3) has also been sustained in, *e. g.*, *Mienke* v. *United States*, 452 F. 2d 1076 (1971); *United States* v. *Marin*, 444 F. 2d 86 (1971); *Duprez* v. *United States*, 435 F. 2d 1276 (1970); *United States* v. *Sanchez-Mata*, 429 F. 2d 1391 (1970); *United States* v. *Avey*, 428 F. 2d 1159 (1970); *United States* v. *Miranda*, 426 F. 2d 283 (1970); and *United States* v. *Elder*, 425 F. 2d 1002 (1970). See also *Valenzuela-Garcia* v. *United States*, 425 F. 2d 1170 (1970), and *Barba-Reyes* v. *United States*, 387 F. 2d 91 (1967).

while driving on the highway leading north of Laredo, Texas, approximately 10 miles from the Mexican border. The purpose of the stop was to inspect for illegally entering aliens. De Leon opened the trunk as he was requested to do. A false bottom in the trunk and what was thought to be an odor of marihuana were immediately noticed and some heroin was seized. Judge Wisdom, writing for himself and Judges Godbold and Roney, concluded that:

> "Stopping the automobile ten miles from the Mexican border to search for illegal aliens was reasonable. *See* United States v. McDaniel, [463 F. 2d 129 (CA5 1972)]; United States v. Warner, 5 Cir. 1971, 441 F. 2d 821; Marsh v. United States, 5 Cir. 1965, 344 F. 2d 317, 8 U. S. C. §§ 1225, 1357; 19 U. S. C. §§ 482, 1581, 8 C. F. R. § 287.1 [1973]; 19 C. F. R. §§ 23.1 (d), 23.11 [1972]. Once the vehicle was reasonably stopped pursuant to an authorized border check the agents were empowered to search the vehicle, including the trunk, for aliens." *Id.*, at 171.

Similarly, *United States* v. *McDaniel,* 463 F. 2d 129 (CA5 1972), upheld a stop and an ensuing search for aliens that uncovered another crime. Judge Goldberg, with Judges Wisdom and Clark, was careful to point out, however, that the authority granted under the statute must still be exercised in a manner consistent with the standards of reasonableness of the Fourth Amendment. "Once the national frontier has been crossed, the search in question must be reasonable upon *all* of its facts, only one of which is the proximity of the search to an international border." *Id.*, at 133. This view appears to have been the law in the Fifth Circuit for many years.[8]

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[8] *E. g., Kelly* v. *United States,* 197 F. 2d 162 (1952). See also *United States* v. *Bird,* 456 F. 2d 1023, 1024 (1972); *Ramirez* v.

The Court of Appeals for the Tenth Circuit has expressed similar views. In *Roa-Rodriquez, supra,* the automobile was stopped in New Mexico some distance from the Mexican border, the purpose being to search for aliens. Relying on the statute, the court, speaking through Judge Breitenstein, concluded that "[i]n the circumstances the initial stop and search for aliens were proper." *Id.,* at 1208. However, when it was determined by the officers that there were no occupants of the car illegally in the country, whether in the trunk or elsewhere, the court held that the officers had no business examining the contents of a jacket found in the trunk. The evidence in this case was excluded. The clear rule of the circuit, however, is that conveyances may be stopped and examined for aliens without warrant or probable cause when in all the circumstances it is reasonable to do so.[9]

Congress itself has authorized vehicle searches at a reasonable distance from international frontiers in order to aid in the enforcement of the immigration laws. Congress has long considered such inspections constitutionally permissible under the Fourth Amendment. So, also, those courts and judges best positioned to make intelligent and sensible assessments of the requirements of reasonableness in the context of controlling illegal entries into this country have consistently and almost without dissent come to the same conclusion that is embodied in the judgment that is reversed today.[10]

United States, 263 F. 2d 385, 387 (1959); and *Haerr* v. *United States,* 240 F. 2d 533, 535 (1957).

[9] *E. g., United States* v. *Anderson,* 468 F. 2d 1280 (1972); and *United States* v. *McCormick,* 468 F. 2d 68 (1972).

[10] Without having undertaken an exhaustive survey, in the 20 court of appeals cases I have noted, including the one before us, 35 different judges of the three Courts of Appeals found inspection

II

I also think that § 1357 (a)(3) was validly applied in this case and that the search for aliens and the discovery of marihuana were not illegal under the Fourth Amendment. It was stipulated that the highway involved here was one of the few roads in California moving away from the Mexican border that did not have an established check station and that it is commonly used by alien smugglers to evade regular checkpoints. The automobile, when stopped sometime after midnight, was 50 miles along the road from the border town of Calexico, proceeding toward Blythe, California; but as a matter of fact it appears that the point at which the car was stopped was approximately only 20 miles due north of the Mexican border. Given the large number of illegal entries across the Mexican border at other than established ports of entry, as well as the likelihood that many illegally entering aliens cross on foot and meet prearranged transportation in this country, I think that under all the circumstances the stop of petitioner's car was reasonable, as was the search for aliens under the rear seat of the car pursuant to an official bulletin suggesting search procedures based on experience. Given a valid search of the car for aliens, it is in no way contended that the discovery and seizure of the marihuana were contrary to law.[11]

I would affirm the judgment of the Court of Appeals.

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of vehicles for illegal aliens without warrant or probable cause to be constitutional. Only one judge has expressed a different view.

[11] The United States does not contend, see Tr. of Oral Arg. 29, and I do not suggest that any search of a vehicle for aliens within 100 miles of the border pursuant to 8 CFR § 287.1 would pass constitutional muster. The possible invalidity of the regulation and of 8 U. S. C. § 1357 (a)(3) in other circumstances is not at issue here.

UNITED STATES *v.* ASH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71–1255. Argued January 10, 1973—Decided June 21, 1973

The Sixth Amendment does not grant an accused the right to have counsel present when the Government conducts a post-indictment photographic display, containing a picture of the accused, for the purpose of allowing a witness to attempt an identification of the offender. A pretrial event constitutes a "critical stage" when the accused requires aid in coping with legal problems or help in meeting his adversary. Since the accused is not present at the time of the photographic display, and, as here, asserts no right to be present, there is no possibility that he might be misled by his lack of familiarity with the law or overpowered by his professional adversary. *United States* v. *Wade*, 388 U. S. 218, distinguished. Pp. 306–321.

149 U. S. App. D. C. 1, 461 F. 2d 92, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed an opinion concurring in the judgment, *post*, p. 321. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 326.

Edward R. Korman argued the cause for the United States. With him on the brief were *Solicitor General Griswold*, *Assistant Attorney General Petersen*, and *Jerome M. Feit*.

Sherman L. Cohn, by appointment of the Court, 408 U. S. 942, argued the cause and filed a brief for respondent.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

In this case the Court is called upon to decide whether

the Sixth Amendment [1] grants an accused the right to have counsel present whenever the Government conducts a post-indictment photographic display, containing a picture of the accused, for the purpose of allowing a witness to attempt an identification of the offender. The United States Court of Appeals for the District of Columbia Circuit, sitting en banc, held, by a 5-to-4 vote, that the accused possesses this right to counsel. 149 U. S. App. D. C. 1, 461 F. 2d 92 (1972). The court's holding is inconsistent with decisions of the courts of appeals of nine other circuits.[2] We granted certiorari

[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

[2] *United States* v. *Bennett*, 409 F. 2d 888, 898–900 (CA2), cert. denied *sub nom. Haywood* v. *United States*, 396 U. S. 852 (1969); *United States ex rel. Reed* v. *Anderson*, 461 F. 2d 739 (CA3 1972) (en banc); *United States* v. *Collins*, 416 F. 2d 696 (CA4 1969), cert. denied, 396 U. S. 1025 (1970); *United States* v. *Ballard*, 423 F. 2d 127 (CA5 1970); *United States* v. *Serio*, 440 F. 2d 827, 829–830 (CA6 1971); *United States* v. *Robinson*, 406 F. 2d 64, 67 (CA7), cert. denied, 395 U. S. 926 (1969); *United States* v. *Long*, 449 F. 2d 288, 301–302 (CA8 1971), cert. denied, 405 U. S. 974 (1972); *Allen* v. *Rhay*, 431 F. 2d 1160, 1166–1167 (CA9 1970); *McGee* v. *United States*, 402 F. 2d 434, 436 (CA10 1968), cert. denied, 394 U. S. 908 (1969). The en banc decision of the Third Circuit in *Anderson* overruled in part a panel decision in *United States* v. *Zeiler*, 427 F. 2d 1305 (CA3 1970).

The question has also produced conflicting decisions in state courts. The majority view, as in the courts of appeals, rejects the claimed right to counsel. See, *e. g.*, *McGhee* v. *State*, 48 Ala. App. 330, 264 So. 2d 560 (Ala. Crim. App. 1972); *State* v. *Yehling*, 108 Ariz. 323, 498 P. 2d 145 (1972); *People* v. *Lawrence*, 4 Cal. 3d 273, 481 P. 2d 212 (1971), cert. denied, 407 U. S. 909 (1972); *Reed* v. *State*, — Del. —, 281 A. 2d 142 (1971); *People* v. *Holiday*, 47 Ill. 2d 300, 265 N. E. 2d 634 (1970); *Baldwin* v. *State*, 5 Md. App. 22, 245 A. 2d 98 (1968) (dicta); *Commonwealth* v. *Ross*, — Mass. —, 282 N. E. 2d 70 (1972), vacated on other grounds and remanded, 410 U. S. 901 (1973); *Stevenson* v. *State*, 244 So. 2d 30 (Miss. 1971); *State* v. *Brookins*, 468 S. W. 2d 42 (Mo. 1971) (dicta); *People* v. *Coles*, 34 App. Div. 2d 1051, 312 N. Y. S. 2d 621 (1970) (dicta); *State* v.

to resolve the conflict and to decide this important constitutional question. 407 U. S. 909 (1972). We reverse and remand.

I

On the morning of August 26, 1965, a man with a stocking mask entered a bank in Washington, D. C., and began waving a pistol. He ordered an employee to hang up the telephone and instructed all others present not to move. Seconds later a second man, also wearing a stocking mask, entered the bank, scooped up money from tellers' drawers into a bag, and left. The gunman followed, and both men escaped through an alley. The robbery lasted three or four minutes.

A Government informer, Clarence McFarland, told authorities that he had discussed the robbery with Charles J. Ash, Jr., the respondent here. Acting on this information, an FBI agent, in February 1966, showed five black-and-white mug shots of Negro males of generally the same age, height, and weight, one of which was of Ash, to four witnesses. All four made uncertain identifications of Ash's picture. At this time Ash was not in custody and had not been charged. On April 1, 1966, an indictment was returned charging Ash and a codefendant, John L. Bailey, in five counts related to this

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Moss, 187 Neb. 391, 191 N. W. 2d 543 (1971); *Drewry* v. *Commonwealth*, 213 Va. 186, 191 S. E. 2d 178 (1972); *State* v. *Nettles*, 81 Wash. 2d 205, 500 P. 2d 752 (1972); *Kain* v. *State*, 48 Wis. 2d 212, 179 N. W. 2d 777 (1970). Cf. *State* v. *Accor*, 277 N. C. 65, 175 S. E. 2d 583 (1970). Several state courts, however, have granted a right to counsel at photographic identifications. See, *e. g.*, *Cox* v. *State*, 219 So. 2d 762 (Fla. App. 1969) (video tapes); *People* v. *Anderson*, 389 Mich. 155, 205 N. W. 2d 461 (1973); *Thompson* v. *State*, 85 Nev. 134, 451 P. 2d 704, cert. denied, 396 U. S. 893 (1969); *Commonwealth* v. *Whiting*, 439 Pa. 205, 266 A. 2d 738, cert. denied, 400 U. S. 919 (1970).

bank robbery, in violation of D. C. Code Ann. § 22–2901 and 18 U. S. C. § 2113 (a).

Trial was finally set for May 1968, almost three years after the crime. In preparing for trial, the prosecutor decided to use a photographic display to determine whether the witnesses he planned to call would be able to make in-court identifications. Shortly before the trial, an FBI agent and the prosecutor showed five color photographs to the four witnesses who previously had tentatively identified the black-and-white photograph of Ash. Three of the witnesses selected the picture of Ash, but one was unable to make any selection. None of the witnesses selected the picture of Bailey which was in the group. This post-indictment [3] identification provides the basis for respondent Ash's claim that he was denied the right to counsel at a "critical stage" of the prosecution.

No motion for severance was made, and Ash and Bailey were tried jointly. The trial judge held a hearing on the suggestive nature of the pretrial photographic displays.[4] The judge did not make a clear ruling on suggestive nature, but held that the Government had demonstrated by "clear and convincing" evidence that in-court identifications would be "based on observation of

[3] Respondent Ash does not assert a right to counsel at the black-and-white photographic display in February 1966 because he recognizes that *Kirby* v. *Illinois*, 406 U. S. 682 (1972), forecloses application of the Sixth Amendment to events before the initiation of adversary criminal proceedings. Tr. of Oral Arg. 21–22; Brief for Respondent 32 n. 21.

[4] At this hearing both the black-and-white and color photographs were introduced as exhibits. App. 44. The FBI agents who conducted the pretrial displays were called as witnesses and were cross-examined fully. App. 10, 28. Two of the four witnesses who were expected to make in-court identifications also testified and were cross-examined concerning the photographic identifications. App. 55, 65.

the suspect other than the intervening observation." App. 63–64.

At trial, the three witnesses who had been inside the bank identified Ash as the gunman, but they were unwilling to state that they were certain of their identifications. None of these made an in-court identification of Bailey. The fourth witness, who had been in a car outside the bank and who had seen the fleeing robbers after they had removed their masks, made positive in-court identifications of both Ash and Bailey. Bailey's counsel then sought to impeach this in-court identification by calling the FBI agent who had shown the color photographs to the witnesses immediately before trial. Bailey's counsel demonstrated that the witness who had identified Bailey in court had failed to identify a color photograph of Bailey. During the course of the examination, Bailey's counsel also, before the jury, brought out the fact that this witness had selected another man as one of the robbers. At this point the prosecutor became concerned that the jury might believe that the witness had selected a third person when, in fact, the witness had selected a photograph of Ash. After a conference at the bench, the trial judge ruled that all five color photographs would be admitted into evidence. The Court of Appeals held that this constituted the introduction of a post-indictment identification at the prosecutor's request and over the objection of defense counsel.[5]

[5] The majority of the Court of Appeals concluded that Ash's counsel properly had preserved his objection to introduction of the photographs. 149 U. S. App. D. C., at 6 n. 6, 461 F. 2d, at 97 n. 6. Although the contrary view of the dissenting judges has been noted here by the Government, the majority's ruling on this issue is not asserted by the Government as a basis for reversal. Pet. for Cert. 4 n. 5; Brief for United States 6 n. 6. Under these circumstances, we are not inclined to disturb the ruling of the Court of Appeals on this close procedural question. App. 104, 126–131.

McFarland testified as a Government witness. He said he had discussed plans for the robbery with Ash before the event and, later, had discussed the results of the robbery with Ash in the presence of Bailey. McFarland was shown to possess an extensive criminal record and a history as an informer.

The jury convicted Ash on all counts. It was unable to reach a verdict on the charges against Bailey, and his motion for acquittal was granted. Ash received concurrent sentences on the several counts, the two longest being 80 months to 12 years.

The five-member majority of the Court of Appeals held that Ash's right to counsel, guaranteed by the Sixth Amendment, was violated when his attorney was not given the opportunity to be present at the photographic displays conducted in May 1968 before the trial. The majority relied on this Court's lineup cases, *United States* v. *Wade,* 388 U. S. 218 (1967), and *Gilbert* v. *California,* 388 U. S. 263 (1967), and on *Stovall* v. *Denno,* 388 U. S. 293 (1967).

The majority did not reach the issue of suggestiveness; their opinion implies, however, that they would order a remand for additional findings by the District Court. 149 U. S. App. D. C., at 7, 461 F. 2d, at 98. The majority refrained from deciding whether the in-court identifications could have independent bases, *id.,* at 14–15 and nn. 20, 21, 461 F. 2d, at 105–106 and nn. 20, 21, but expressed doubt that the identifications at the trial had independent origins.

Dissenting opinions, joined by four judges, disagreed with the decision of the majority that the photographic identification was a "critical stage" requiring counsel, and criticized the majority's suggestion that the in-court identifications were tainted by defects in the photographic identifications. *Id.,* at 14–43, 461 F. 2d, at 106–134.

II

The Court of Appeals relied exclusively on that portion of the Sixth Amendment providing, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The right to counsel in Anglo-American law has a rich historical heritage, and this Court has regularly drawn on that history in construing the counsel guarantee of the Sixth Amendment. We re-examine that history in an effort to determine the relationship between the purposes of the Sixth Amendment guarantee and the risks of a photographic identification.

In *Powell* v. *Alabama*, 287 U. S. 45, 60–66 (1932), the Court discussed the English common-law rule that severely limited the right of a person accused of a felony to consult with counsel at trial. The Court examined colonial constitutions and statutes and noted that "in at least twelve of the thirteen colonies the rule of the English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes." *Id.*, at 64–65. The Sixth Amendment counsel guarantee, thus, was derived from colonial statutes and constitutional provisions designed to reject the English common-law rule.

Apparently several concerns contributed to this rejection at the very time when countless other aspects of the common law were being imported. One consideration was the inherent irrationality of the English limitation. Since the rule was limited to felony proceedings, the result, absurd and illogical, was that an accused misdemeanant could rely fully on counsel, but

the accused felon, in theory at least,[6] could consult counsel only on legal questions that the accused proposed to the court. See *Powell* v. *Alabama*, 287 U. S., at 60. English writers were appropriately critical of this inconsistency. See, for example, 4 W. Blackstone, Commentaries *355.

A concern of more lasting importance was the recognition and awareness that an unaided layman had little skill in arguing the law or in coping with an intricate procedural system. The function of counsel as a guide through complex legal technicalities long has been recognized by this Court. Mr. Justice Sutherland's well-known observations in *Powell* bear repeating here:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." 287 U. S., at 69.

The Court frequently has interpreted the Sixth Amend-

[6] Although the English limitation was not expressly rejected until 1836, the rule appears to have been relaxed in practice. 9 W. Holdsworth, History of English Law 235 (1926); 4 W. Blackstone, Commentaries *355–356.

ment to assure that the "guiding hand of counsel" is available to those in need of its assistance. See, for example, *Gideon* v. *Wainwright*, 372 U. S. 335, 344–345 (1963), and *Argersinger* v. *Hamlin*, 407 U. S. 25, 31 (1972).

Another factor contributing to the colonial recognition of the accused's right to counsel was the adoption of the institution of the public prosecutor from the Continental inquisitorial system. One commentator has explained the effect of this development:

> "[E]arly in the eighteenth century the American system of judicial administration adopted an institution which was (and to some extent still is) unknown in England: while rejecting the fundamental juristic concepts upon which continental Europe's inquisitorial system of criminal procedure is predicated, the colonies borrowed one of its institutions, the public prosecutor, and grafted it upon the body of English (accusatorial) procedure embodied in the common law. Presumably, this innovation was brought about by the lack of lawyers, particularly in the newly settled regions, and by the increasing distances between the colonial capitals on the eastern seaboard and the ever-receding western frontier. Its result was that, at a time when virtually all but treason trials in England were still in the nature of suits between private parties, the accused in the colonies faced a government official whose specific function it was to prosecute, and who was incomparably more familiar than the accused with the problems of procedure, the idiosyncrasies of juries, and, last but not least, the personnel of the court." F. Heller, The Sixth Amendment 20–21 (1951) (footnote omitted).

Thus, an additional motivation for the American rule was a desire to minimize the imbalance in the adversary system that otherwise resulted with the creation of a professional prosecuting official. Mr. Justice Black, writing for the Court in *Johnson* v. *Zerbst*, 304 U. S. 458, 462–463 (1938), spoke of this equalizing effect of the Sixth Amendment's counsel guarantee:

> "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."

This historical background suggests that the core purpose of the counsel guarantee was to assure "Assistance" at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor.[7] Later developments have led this Court

[7] Similar concerns eventually led to abandonment of the common-law rule in England. That rule originated at a time when counsel was said to be "hardly necessary" because expert knowledge of the law was not required at trial and systematic examination of witnesses had not yet developed. T. Plucknett, A Concise History of the Common Law 410 (4th ed. 1948).

Confrontation with legal technicalities became common at English trials when complex rules developed for attacking the indictment. *Ibid.* The English response was not an unlimited right to counsel, however, but was rather a right for counsel to argue only legal questions. See *Powell* v. *Alabama*, 287 U. S. 45, 60 (1932). A plea in abatement directed at insufficiency of the indictment, for example, allowed a prisoner to "pray counsel to be assigned to him to manage his exceptions and take more." 2 M. Hale, Pleas of the Crown 236 (1736).

Confrontation with a professional prosecutor arose in English treason trials before it appeared in ordinary criminal trials. See 1 J. Stephen, History of the Criminal Law of England 348–350 (1883). In 1695 this imbalance in the adversary process was corrected by a

to recognize that "Assistance" would be less than meaningful if it were limited to the formal trial itself.

This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both. In *Wade*, the Court explained the process of expanding the counsel guarantee to these confrontations:

> "When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical'

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statute granting prisoners the right to counsel at treason trials. 7 Wm. 3, c. 3 (1695). Hawkins explained that the professional ability of king's counsel motivated this reform because it had "been found by experience that prisoners have been often under great disadvantages from the want of counsel, in prosecutions of high treason against the king's person, which are generally managed for the crown with greater skill and zeal than ordinary prosecutions . . . ." 2 W. Hawkins, Pleas of the Crown 566 (Leach ed. 1787). The 1695 statute weakened the English rule and, after a century of narrowing practical application, see n. 6, *supra*, the rule was finally abrogated by statute in 1836. The Trials for Felony Act, 6 & 7 Wm. 4, c. 114 (1836).

> stages of the proceedings." 388 U. S., at 224 (footnote omitted).

The Court consistently has applied a historical interpretation of the guarantee, and has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself.

Recent cases demonstrate the historical method of this expansion. In *Hamilton* v. *Alabama,* 368 U. S. 52 (1961), and in *White* v. *Maryland,* 373 U. S. 59 (1963), the accused was confronted with the procedural system and was required, with definite consequences, to enter a plea. In *Massiah* v. *United States,* 377 U. S. 201 (1964), the accused was confronted by prosecuting authorities who obtained, by ruse and in the absence of defense counsel, incriminating statements. In *Coleman* v. *Alabama,* 399 U. S. 1 (1970), the accused was confronted by his adversary at a "critical stage" preliminary hearing at which the uncounseled accused could not hope to obtain so much benefit as could his skilled adversary.

The analogy between the unrepresented accused at the pretrial confrontation and the unrepresented defendant at trial, implicit in the cases mentioned above, was explicitly drawn in *Wade:*

> "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—'that's the man.'" 388 U. S., at 235–236.

Throughout this expansion of the counsel guarantee to trial-like confrontations, the function of the lawyer has remained essentially the same as his function at trial. In all cases considered by the Court, counsel has continued to act as a spokesman for, or advisor to, the accused. The accused's right to the "Assistance of Counsel" has meant just that, namely, the right of the accused to have counsel acting as his assistant. In *Hamilton* and *White*, for example, the Court envisioned the lawyer as advising the accused on available defenses in order to allow him to plead intelligently. 368 U. S., at 54–55; 373 U. S., at 60. In *Massiah* counsel could have advised his client on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution. 377 U. S., at 205. Cf. *Miranda* v. *Arizona*, 384 U. S. 436, 466 (1966). In *Coleman* the skill of the lawyer in examining witnesses, probing for evidence, and making legal arguments was relied upon by the Court to demonstrate that, in the light of the purpose of the preliminary hearing under Alabama law, the accused required "Assistance" at that hearing. 399 U. S., at 9.

The function of counsel in rendering "Assistance" continued at the lineup under consideration in *Wade* and its companion cases. Although the accused was not confronted there with legal questions, the lineup offered opportunities for prosecuting authorities to take advantage of the accused. Counsel was seen by the Court as being more sensitive to, and aware of, suggestive influences than the accused himself, and as better able to reconstruct the events at trial. Counsel present at lineup would be able to remove disabilities of the accused in precisely the same fashion that counsel compensated for the disabilities of the layman at trial. Thus, the Court mentioned that the accused's memory might be dimmed by "emotional tension," that the accused's credibility at

trial would be diminished by his status as defendant, and that the accused might be unable to present his version effectively without giving up his privilege against compulsory self-incrimination. *United States* v. *Wade*, 388 U. S., at 230–231. It was in order to compensate for these deficiencies that the Court found the need for the assistance of counsel.

This review of the history and expansion of the Sixth Amendment counsel guarantee demonstrates that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary. Against the background of this traditional test, we now consider the opinion of the Court of Appeals.

III

Although the Court of Appeals' majority recognized the argument that "a major purpose behind the right to counsel is to protect the defendant from errors that he himself might make if he appeared in court alone," the court concluded that "other forms of prejudice," mentioned and recognized in *Wade*, could also give rise to a right to counsel. 149 U. S. App. D. C., at 10, 461 F. 2d, at 101. These forms of prejudice were felt by the court to flow from the possibilities for mistaken identification inherent in the photographic display.[8]

[8] "[T]he dangers of mistaken identification from uncounseled lineup identifications set forth in *Wade* are applicable in large measure to photographic as well as corporeal identifications. These include, notably, the possibilities of suggestive influence or mistake—particularly where witnesses had little or no opportunity for detailed observation during the crime; the difficulty of reconstructing suggestivity—even greater when the defendant is not even present; the tendency of a witness's identification, once given under these circumstances, to be frozen. While these difficulties may be somewhat mitigated by preserving the photograph shown, it may also be said that a photograph can preserve the record of a lineup; yet this does

We conclude that the dangers of mistaken identification, mentioned in *Wade*, were removed from context by the Court of Appeals and were incorrectly utilized as a sufficient basis for requiring counsel. Although *Wade* did discuss possibilities for suggestion and the difficulty for reconstructing suggestivity, this discussion occurred only after the Court had concluded that the lineup constituted a trial-like confrontation, requiring the "Assistance of Counsel" to preserve the adversary process by compensating for advantages of the prosecuting authorities.

The above discussion of *Wade* has shown that the traditional Sixth Amendment test easily allowed extension of counsel to a lineup. The similarity to trial was apparent, and counsel was needed to render "Assistance" in counterbalancing any "overreaching" by the prosecution.

After the Court in *Wade* held that a lineup constituted a trial-like confrontation requiring counsel, a more difficult issue remained in the case for consideration. The same changes in law enforcement that led to lineups and pretrial hearings also generated other events at which the accused was confronted by the prosecution. The Government had argued in *Wade* that if counsel was required at a lineup, the same forceful considerations would mandate counsel at other preparatory steps in the "gathering of the prosecution's evidence," such as, for

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not justify a lineup without counsel. The same may be said of the opportunity to examine the participants as to what went on in the course of the identification, whether at lineup or on photograph. Sometimes this may suffice to bring out all pertinent facts, even at a lineup, but this would not suffice under *Wade* to offset the constitutional infringement wrought by proceeding without counsel. The presence of counsel avoids possibilities of suggestiveness in the manner of presentation that are otherwise ineradicable." 149 U. S. App. D. C., at 9–10, 461 F. 2d, at 100–101.

particular example, the taking of fingerprints or blood samples. 388 U. S., at 227.

The Court concluded that there were differences. Rather than distinguishing these situations from the lineup in terms of the need for counsel to assure an equal confrontation at the time, the Court recognized that there were times when the subsequent trial would cure a one-sided confrontation between prosecuting authorities and the uncounseled defendant. In other words, such stages were not "critical." Referring to fingerprints, hair, clothing, and other blood samples, the Court explained:

> "Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts." 388 U. S., at 227–228.

The structure of *Wade*, viewed in light of the careful limitation of the Court's language to "confrontations," [9]

[9] The Court rather narrowly defined the issues under consideration:

"The pretrial *confrontation* for purpose of identification may take the form of a lineup, also known as an 'identification parade' or 'showup,' as in the present case, or presentation of the suspect alone to the witness, as in *Stovall* v. *Denno*, *supra*. It is obvious that risks of suggestion attend either form of *confrontation* . . . . But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and *other forms of identification confrontations*." *United States* v. *Wade*, 388 U. S. 218, 229–230 (1967) (emphasis added).

The photographic identification could hardly have been overlooked by inadvertence since the Government stressed the similarity between lineups and photographic identifications. Brief for United States in *Wade*, No. 334, O. T. 1966, pp. 7, 14, 19, 24.

makes it clear that lack of scientific precision and inability to reconstruct an event are not the tests for requiring counsel in the first instance. These are, instead, the tests to determine whether confrontation with counsel at trial can serve as a substitute for counsel at the pretrial confrontation. If accurate reconstruction is possible, the risks inherent in any confrontation still remain, but the opportunity to cure defects at trial causes the confrontation to cease to be "critical." The opinion of the Court even indicated that changes in procedure might cause a lineup to cease to be a "critical" confrontation:

> "Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as 'critical.'" 388 U. S., at 239 (footnote omitted).

See, however, *id.*, at 262 n. (opinion of Fortas, J.).

The Court of Appeals considered its analysis complete after it decided that a photographic display lacks scientific precision and ease of accurate reconstruction at trial. That analysis, under *Wade*, however, merely carries one to the point where one must establish that the trial itself can provide no substitute for counsel if a pretrial confrontation is conducted in the absence of counsel. Judge Friendly, writing for the Second Circuit in *United States* v. *Bennett*, 409 F. 2d 888 (1969), recognized that the "criticality" test of *Wade*, if applied outside the confrontation context, would result in drastic expansion of the right to counsel:

> "None of the classical analyses of the assistance to be given by counsel, Justice Sutherland's in Powell v. Alabama . . . and Justice Black's in Johnson v.

> Zerbst . . . and Gideon v. Wainwright . . . suggests that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence even when, as here, the defendant is under arrest; counsel is rather to be provided to prevent the defendant himself from falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proffered. Many other aspects of the prosecution's interviews with a victim or a witness to a crime afford just as much opportunity for undue suggestion as the display of photographs; so, too, do the defense's interviews, notably with alibi witnesses." *Id.*, at 899–900.

We now undertake the threshhold analysis that must be addressed.

IV

A substantial departure from the historical test would be necessary if the Sixth Amendment were interpreted to give Ash a right to counsel at the photographic identification in this case. Since the accused himself is not present at the time of the photographic display, and asserts no right to be present, Brief for Respondent 40, no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary. Similarly, the counsel guarantee would not be used to produce equality in a trial-like adversary confrontation. Rather, the guarantee was used by the Court of Appeals to produce confrontation at an event that previously was not analogous to an adversary trial.

Even if we were willing to view the counsel guarantee in broad terms as a generalized protection of the adversary process, we would be unwilling to go so far as to extend the right to a portion of the prosecutor's trial-preparation interviews with witnesses. Although pho-

tography is relatively new, the interviewing of witnesses before trial is a procedure that predates the Sixth Amendment. In England in the 16th and 17th centuries counsel regularly interviewed witnesses before trial. 9 W. Holdsworth, History of English Law 226–228 (1926). The traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself.

That adversary mechanism remains as effective for a photographic display as for other parts of pretrial interviews.[10] No greater limitations are placed on defense counsel in constructing displays, seeking witnesses, and conducting photographic identifications than those applicable to the prosecution.[11] Selection of the picture of a person other than the accused, or the inability of a witness to make any selection, will be useful to the defense in precisely the same manner that the selection of

[10] Duplication by defense counsel is a safeguard that normally is not available when a formal confrontation occurs. Defense counsel has no statutory authority to conduct a preliminary hearing, for example, and defense counsel will generally be prevented by practical considerations from conducting his own lineup. Even in some confrontations, however, the possibility of duplication may be important. The Court noted this in holding that the taking of handwriting exemplars did not constitute a "critical stage":

"If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts." *Gilbert* v. *California*, 388 U. S. 263, 267 (1967).

[11] We do not suggest, of course, that defense counsel has any greater freedom than the prosecution to abuse the photographic identification. Evidence of photographic identifications conducted by the defense may be excluded as unreliable under the same standards that would be applied to unreliable identifications conducted by the Government.

a picture of the defendant would be useful to the prosecution.[12] In this very case, for example, the initial tender of the photographic display was by Bailey's counsel, who sought to demonstrate that the witness had failed to make a photographic identification. Although we do not suggest that equality of access to photographs removes all potential for abuse,[13] it does remove any inequality in the adversary process itself and thereby fully satisfies the historical spirit of the Sixth Amendment's counsel guarantee.

The argument has been advanced that requiring counsel might compel the police to observe more scientific procedures or might encourage them to utilize corporeal rather than photographic displays.[14] This Court has

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[12] The Court of Appeals deemed it significant that a photographic identification is admissible as substantive evidence, whereas other parts of interviews may be introduced only for impeachment. 149 U. S. App. D. C., at 10, 461 F. 2d, at 101. In this case defense counsel for Bailey introduced the inability to identify, and that was received into evidence. Thus defense counsel still received benefits equivalent to those available to the prosecution. Although defense counsel may be concerned that repeated photographic displays containing the accused's picture as the only common characteristic will tend to promote identification of the accused, the defense has other balancing devices available to it, such as the use of a sufficiently large number of photographs to counteract this possibility.

[13] Although the reliability of in-court identifications and the effectiveness of impeachment may be improved by equality of access, we do not suggest that the prosecution's photographic identification would be more easily reconstructed at trial simply because defense counsel could conduct his own photographic display. But, as we have explained, *supra*, at 315–316, the possibility of perfect reconstruction is relevant to the evaluation of substitutes for counsel, not to the initial designation of an event as a "critical stage."

[14] Sobel, Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods, 38 Brooklyn L. Rev. 261, 299 (1971); Comment, 43 N. Y. U. L. Rev. 1019, 1022 (1968); Note, 2 Rutgers Camden L. J. 347, 359 (1970); Note, 21 Syracuse L. Rev. 1235, 1241–1242 (1970). A variant of

recognized that improved procedures can minimize the dangers of suggestion. *Simmons* v. *United States,* 390 U. S. 377, 386 n. 6 (1968). Commentators have also proposed more accurate techniques.[15]

Pretrial photographic identifications, however, are hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused. Evidence favorable to the accused may be withheld; testimony of witnesses may be manipulated; the results of laboratory tests may be contrived. In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor,[16] who, as so often has been said, may "strike hard blows" but not "foul ones." *Berger* v. *United States,* 295 U. S. 78, 88 (1935); *Brady* v. *Maryland,* 373 U. S. 83, 87–88 (1963). If that safeguard fails, review remains available under due process standards. See *Giglio* v. *United States,* 405 U. S. 150 (1972); *Mooney* v. *Holohan,* 294 U. S. 103, 112 (1935); *Miller* v. *Pate,* 386 U. S. 1 (1967); *Chambers* v. *Mississippi,* 410 U. S. 284 (1973). These same safeguards apply to misuse of photographs. See *Simmons* v. *United States,* 390 U. S., at 384.

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this argument is that photographic identifications may be used to circumvent the need for counsel at lineups. Brief for Respondent 44–45.

[15] *E. g.,* P. Wall, Eye-Witness Identification in Criminal Cases 77–85 (1965); Sobel, *supra,* n. 14, at 309–310; Comment, 56 Iowa L. Rev. 408, 420–421 (1970).

[16] Throughout a criminal prosecution the prosecutor's ethical responsibility extends, of course, to supervision of any continuing investigation of the case. By prescribing procedures to be used by his agents and by screening the evidence before trial with a view to eliminating unreliable identifications, the prosecutor is able to minimize abuse in photographic displays even if they are conducted in his absence.

We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required.

We hold, then, that the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender. This holding requires reversal of the judgment of the Court of Appeals. Although respondent Ash has urged us to examine this photographic display under the due process standard enunciated in *Simmons* v. *United States*, 390 U. S., at 384, the Court of Appeals, expressing the view that additional findings would be necessary, refused to decide the issue. 149 U. S. App. D. C., at 7, 461 F. 2d, at 98. We decline to consider this question on this record in the first instance. It remains open, of course, on the Court of Appeals' remand to the District Court.

Reversed and remanded.

MR. JUSTICE STEWART, concurring in the judgment.

The issue in the present case is whether, under the Sixth Amendment, a person who has been indicted is entitled to have a lawyer present when prosecution witnesses are shown the person's photograph and asked if they can identify him.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This Court's decisions make it clear that a defendant is entitled to the assistance of counsel not only at the trial itself, but at all "critical stages" of his "prosecution." See *Coleman* v. *Alabama*, 399 U. S. 1; *United States* v. *Wade*, 388 U. S. 218; *Gilbert* v. *California*, 388 U. S. 263; *Hamilton* v. *Alabama*, 368 U. S. 52. The requirement

that there be a "prosecution," means that this constitutional "right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against [an accused]. . . ." "It is this point . . . that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Kirby* v. *Illinois*, 406 U. S. 682, 688, 690 (plurality opinion). Since the photographic identification in the present case occurred after the accused had been indicted, and thus clearly after adversary judicial proceedings had been initiated, the only question is whether that procedure was such a "critical stage" that the Constitution required the presence of counsel.

In *United States* v. *Wade*, *supra*, the Court determined that a pretrial proceeding is a "critical stage" if "the presence of . . . counsel is necessary to preserve the defendant's . . . right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." 388 U. S., at 227. Pretrial proceedings are "critical," then, if the presence of counsel is essential "to protect the fairness of the trial itself." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 239; cf. *Coleman* v. *Alabama*, 399 U. S. 1, 27–28 (STEWART, J., dissenting).

The Court held in *Wade* that a post-indictment, pretrial lineup at which the accused was exhibited to identifying witnesses was such a critical stage, because of the substantial possibility that the accused's right to a fair trial would otherwise be irretrievably lost. The hazard of unfair suggestive influence at a lineup, which, because of the nature of the proceeding, could seldom be reconstructed at trial, left little doubt, the Court thought, "that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" 388 U. S., at 237.

The Court stressed in *Wade* that the danger of mistaken identification at trial was appreciably heightened by the "degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *Id.*, at 228. There are numerous and subtle possibilities for such improper suggestion in the dynamic context of a lineup. Judge Wilkey, dissenting in the present case, accurately described a lineup as:

> "a little drama, stretching over an appreciable span of time. The accused is there in the flesh, three-dimensional and always full-length. Further, he isn't merely there, he acts. He walks on stage, he blinks in the glare of lights, he turns and twists, often muttering asides to those sharing the spotlight. He can be required to utter significant words, to turn a profile or back, to walk back and forth, to doff one costume and don another. All the while the potentially identifying witness is watching, a prosecuting attorney and a police detective at his elbow, ready to record the witness' every word and reaction." 149 U. S. App. D. C. 1, 17, 461 F. 2d 92, 108.

With no attorney for the accused present at this "little drama," defense counsel at trial could seldom convincingly discredit a witness' courtroom identification by showing it to be based on an impermissibly suggestive lineup. In addition to the problems posed by the fluid nature of a lineup, the Court in *Wade* pointed out that neither the witnesses nor the lineup participants were likely to be alert for suggestive influences or schooled in their detection. "In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." 388 U. S., at 231–232.

The Court held, therefore, that counsel was required at a lineup, primarily as an observer, to ensure that defense counsel could effectively confront the prosecution's evidence at trial. Attuned to the possibilities of suggestive influences, a lawyer could see any unfairness at a lineup, question the witnesses about it at trial, and effectively reconstruct what had gone on for the benefit of the jury or trial judge.*

A photographic identification is quite different from a lineup, for there are substantially fewer possibilities of impermissible suggestion when photographs are used, and those unfair influences can be readily reconstructed at trial. It is true that the defendant's photograph may be markedly different from the others displayed, but this unfairness can be demonstrated at trial from an actual comparison of the photographs used or from the witness' description of the display. Similarly, it is possible that the photographs could be arranged in a suggestive manner, or that by comment or gesture the prosecuting authorities might single out the defendant's picture. But these are the kinds of overt influence that a witness can easily recount and that would serve to impeach the identification testimony. In short, there are few possibilities for unfair suggestiveness—and those rather blatant and easily reconstructed. Accordingly, an accused would not be foreclosed from an effective cross-examination of an identification witness simply because his counsel was

*I do not read *Wade* as requiring counsel because a lineup is a "trial-type" situation, nor do I understand that the Court required the presence of an attorney because of the advice or assistance he could give to his client at the lineup itself. Rather, I had thought the reasoning of *Wade* was that the right to counsel is essentially a protection for the defendant at trial, and that counsel is necessary at a lineup in order to ensure a meaningful confrontation and the effective assistance of counsel at trial.

not present at the photographic display. For this reason, a photographic display cannot fairly be considered a "critical stage" of the prosecution. As the Court of Appeals for the Third Circuit aptly concluded:

> "If . . . the identification is not in a live lineup at which defendant may be forced to act, speak or dress in a suggestive way, where the possibilities for suggestion are multiplied, where the ability to reconstruct the events is minimized, and where the effect of a positive identification is likely to be permanent, but at a viewing of immobile photographs easily reconstructible, far less subject to subtle suggestion, and far less indelible in its effect when the witness is later brought face to face with the accused, there is even less reason to denominate the procedure a critical stage at which counsel must be present." *United States ex rel. Reed* v. *Anderson,* 461 F. 2d 739, 745.

Preparing witnesses for trial by checking their identification testimony against a photographic display is little different, in my view, from the prosecutor's other interviews with the victim or other witnesses before trial. See *United States* v. *Bennett,* 409 F. 2d 888, 900. While these procedures can be improperly conducted, the possibility of irretrievable prejudice is remote, since any unfairness that does occur can usually be flushed out at trial through cross-examination of the prosecution witnesses. The presence of defense counsel at such pretrial preparatory sessions is neither appropriate nor necessary under our adversary system of justice "to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *United States* v. *Wade, supra,* at 227.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The Court holds today that a pretrial display of photographs to the witnesses of a crime for the purpose of identifying the accused, unlike a lineup, does not constitute a "critical stage" of the prosecution at which the accused is constitutionally entitled to the presence of counsel. In my view, today's decision is wholly unsupportable in terms of such considerations as logic, consistency, and, indeed, fairness. As a result, I must reluctantly conclude that today's decision marks simply another [1] step towards the complete evisceration of the fundamental constitutional principles established by this Court, only six years ago, in *United States* v. *Wade*, 388 U. S. 218 (1967); *Gilbert* v. *California*, 388 U. S. 263 (1967); and *Stovall* v. *Denno*, 388 U. S. 293 (1967). I dissent.

I

On the morning of August 26, 1965, two men wearing stocking masks robbed the American Security and Trust Co. in Washington, D. C. The robbery lasted only about three or four minutes and, on the day of the crime, none of the four witnesses was able to give the police a description of the robbers' facial characteristics. Some five months later, on February 3, 1966, an FBI agent showed each of the four witnesses a group of black and white mug shots of the faces of five black males, including respondent, all of generally the same age, height, and weight. Respondent's photograph was included because of information received from a Government informant charged with other crimes.[2] None of the wit-

[1] See *Kirby* v. *Illinois*, 406 U. S. 682 (1972).

[2] At the time of respondent's trial, the informant, one Clarence McFarland, was serving a sentence for bank robbery. According to the Court of Appeals, "McFarland had been before the grand jury

nesses was able to make a "positive" identification of respondent.[3]

On April 1, 1966, an indictment was returned charging respondent and a codefendant in five counts relating to the robbery of the American Security and Trust Co. Trial was finally set for May 8, 1968, almost three years after the crime and more than two years after the return of the indictment. During the entire two-year period between indictment and trial, although one of the witnesses expressly sought an opportunity to see respondent in person, the Government never attempted to arrange a corporeal lineup for the purposes of identification. Rather, *less than 24 hours before trial,* the FBI agent, accompanied by the prosecutor, showed five color photographs to the witnesses, three of whom identified the picture of respondent.

At trial, all four witnesses made in-court identifications of respondent, but only one of these witnesses was "positive" of her identification. The fact that three of the witnesses had previously identified respondent from the color photographs, and the photographs themselves, were also admitted into evidence. The only other evi-

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with regard to five separate offenses, in addition to his bank robbery, and had not been indicted on any of them, including one in which he had confessed guilt. The Assistant United States Attorney had arranged to have McFarland transferred from the D. C. Jail to a local jail in Rockville, Maryland, and in addition had helped McFarland's wife move from Southeast Washington to an apartment near the parochial school that McFarland's children were due to attend. 149 U. S. App. D. C. 1, 6 n. 7, 461 F. 2d 92, 97 n. 7 (1972). The Assistant United States Attorney also testified that he "had indicated he would testify before the parole board in McFarland's behalf." *Id.,* at 6, 461 F. 2d, at 97.

[3] Respondent does not contend that he was denied his Sixth Amendment right to counsel at the pre-indictment display of the black and white photographs. Tr. of Oral Arg. 21–22; Brief for Respondent 32 n. 21.

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dence implicating respondent in the crime was the testimony of the Government informant.[4] On the basis of this evidence, respondent was convicted on all counts of the indictment.

On appeal, the United States Court of Appeals for the District of Columbia Circuit, sitting en banc, reversed respondent's conviction. 149 U. S. App. D. C. 1, 461 F. 2d 92 (1972). Noting that "the dangers of mistaken identification from uncounseled lineup identifications . . . are applicable in large measure to photographic as well as corporeal identifications," [5] the Court of Appeals reasoned that this Court's decisions in *Wade*, *Gilbert*, and *Stovall*, compelled the conclusion that a pretrial photographic identification, like a lineup, is a "critical" stage of the prosecution at which the accused is constitutionally entitled to the attendance of counsel. Accordingly, the Court of Appeals held that respondent was denied his Sixth Amendment right to "the Assistance of Counsel for his defence" when his attorney was not given an opportunity to attend the display of the color photographs on the very eve of trial.[6] In my view, both the reasoning and conclusion of the Court of Appeals were unimpeachably correct, and I would therefore affirm.

II

In June 1967, this Court decided a trilogy of "lineup" cases which brought into sharp focus the problems of

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[4] As the Court of Appeals noted, this testimony was of at least questionable credibility. See n. 2, *supra*.

[5] 149 U. S. App. D. C., at 9, 461 F. 2d, at 100.

[6] The Court of Appeals also noted "that there are at the very least strong elements of suggestiveness in this color photo confrontation," and that "it is hard to see how the Government can be held to have shown, by clear and convincing evidence, that these color photographs did not affect the in-court identification made one day later." *Id.*, at 7, 14 n. 20, 461 F. 2d, at 98, 105 n. 20.

pretrial identification. See *United States* v. *Wade, supra; Gilbert* v. *California, supra; Stovall* v. *Denno, supra.* In essence, those decisions held (1) that a pretrial lineup is a "critical stage" in the criminal process at which the accused is constitutionally entitled to the presence of counsel; (2) that evidence of an identification of the accused at such an uncounseled lineup is *per se* inadmissible; and (3) that evidence of a subsequent in-court identification of the accused is likewise inadmissible unless the Government can demonstrate by clear and convincing evidence that the in-court identification was based upon observations of the accused independent of the prior uncounseled lineup identification. The considerations relied upon by the Court in reaching these conclusions are clearly applicable to photographic as well as corporeal identifications. Those considerations bear repeating here in some detail, for they touch upon the very heart of our criminal justice system—the right of an accused to a fair trial, including the effective "Assistance of Counsel for his defence."

At the outset, the Court noted that "identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *United States* v. *Wade, supra,* at 228. Indeed, "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." *Ibid.* Apart from "the dangers inherent in eyewitness identification," *id.,* at 235, such as unreliable memory or perception, the Court pointed out that "[a] major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *Id.,* at 228. The Court recognized that the dangers of suggestion are not necessarily due to "police

procedures intentionally designed to prejudice an accused." *Id.*, at 235. On the contrary, "[s]uggestion can be created intentionally or unintentionally in many subtle ways." *Id.*, at 229. And the " 'fact that the police themselves have, in a given case, little or no doubt that the man put up for identification has committed the offense . . . involves a danger that this persuasion may communicate itself even in a doubtful case to the witness in some way . . . .' " *Id.*, at 235, quoting Williams & Hammelmann, Identification Parades–I, [1963] Crim. L. Rev. 479, 483.

The Court also expressed concern over the possibility that a mistaken identification at a pretrial lineup might itself be conclusive on the question of identity, thereby resulting in the conviction of an innocent man. The Court observed that " 'once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.' " *United States* v. *Wade, supra,* at 229, quoting Williams & Hammelmann, *supra,* at 482.

Moreover, "the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial." *United States* v. *Wade, supra,* at 230. For "as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups . . . ." *Ibid.* Although the accused is present at such corporeal identifications, he is hardly in a position to detect many of the more subtle "improper influences" that might infect the identification.[7] In addition, the Court empha-

[7] The Court pointed out that "[i]mproper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal

sized that "neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And, if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences." *Ibid.* As a result, "even though cross-examination is a precious safeguard to a fair trial, it cannot [in this context] be viewed as an absolute assurance of accuracy and reliability." *Id.*, at 235.

With these considerations in mind, the Court reasoned that "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.*, at 231–232. And "[i]nsofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." *Id.*, at 235. Thus, noting that "presence of counsel [at the lineup] can often avert prejudice and assure a meaningful confrontation at trial," the Court concluded that a pretrial corporeal identification is "a critical stage of the prosecution at which [the accused is] 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" *Id.*, at 236, 237, quoting *Powell* v. *Alabama*, 287 U. S. 45, 57 (1932).

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record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover, any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury's choice is between the accused's unsupported version and that of the police officers present." *United States* v. *Wade*, 388 U. S. 218, 230–231 (1967).

III

As the Court of Appeals recognized, "the dangers of mistaken identification . . . set forth in *Wade* are applicable in large measure to photographic as well as corporeal identifications." 149 U. S. App. D. C., at 9, 461 F. 2d, at 100. To the extent that misidentification may be attributable to a witness' faulty memory or perception, or inadequate opportunity for detailed observation during the crime, the risks are obviously as great at a photographic display as at a lineup.[8] But "[b]ecause of the inherent limitations of photography, which presents its subject in two dimensions rather than the three dimensions of reality, . . . a photographic identification, even when properly obtained, is clearly inferior to a properly obtained corporeal identification." P. Wall, Eye-Witness Identification in Criminal Cases 70 (1965). Indeed, noting "the hazards of initial identification by photograph," we have expressly recognized that "a corporeal identification . . . is normally more accurate" than a photographic identification. *Simmons* v. *United States*, 390 U. S. 377, 384, 386 n. 6 (1968).[9] Thus, in this sense at

[8] Thus, "[a] witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures . . . there is some danger that the witness may make an incorrect identification." *Simmons* v. *United States*, 390 U. S. 377, 383 (1968).

[9] See also Sobel, Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods, 38 Brooklyn L. Rev. 261, 264, 296 (1971); Williams, Identification Parades, [1955] Crim. L. Rev. 525, 531; Comment, Photographic Identification: The Hidden Persuader, 56 Iowa L. Rev. 408, 419 (1970); Note, Pretrial Photographic Identification—A "Critical Stage" of Criminal Proceedings?, 21 Syracuse L. Rev. 1235, 1241 (1970). Indeed, recognizing the superiority of corporeal to photographic identifications, English courts have long held that once the accused is in custody, pre-lineup photographic identification is "in-

least, the dangers of misidentification are even greater at a photographic display than at a lineup.

Moreover, as in the lineup situation, the possibilities for impermissible suggestion in the context of a photographic display are manifold. See *id.*, at 383. Such suggestion, intentional or unintentional, may derive from three possible sources. First, the photographs themselves might tend to suggest which of the pictures is that of the suspect. For example, differences in age, pose, or other physical characteristics of the persons represented, and variations in the mounting, background, lighting, or markings of the photographs all might have the effect of singling out the accused.[10]

Second, impermissible suggestion may inhere in the manner in which the photographs are displayed to the witness. The danger of misidentification is, of course, "increased if the police display to the witness . . . the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized." *Ibid.* And, if the photographs are arranged in an asymmetrical pattern, or if they are displayed in a time sequence that tends to emphasize a particular photograph, "any identification of the photograph which stands out from the rest is no more reliable than an identification of a single photograph, exhibited alone." P. Wall, *supra*, at 81.

Third, gestures or comments of the prosecutor at the time of the display may lead an otherwise uncertain

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defensible" and grounds for quashing the conviction. *Rex* v. *Haslam*, 19 Crim. App. Rep. 59, 60 (1925); *Rex* v. *Goss*, 17 Crim. App. Rep. 196, 197 (1923). See also P. Wall, Eye-Witness Identification in Criminal Cases 71 (1965).

[10] See, *e. g.*, Comment, *supra*, n. 9, at 410–411; Note, Criminal Procedure—Photo-Identification—*Stovall* Prospectivity Rule Invoked to Avoid Extension of Right to Counsel, 43 N. Y. U. L. Rev. 1019, 1021 (1968).

witness to select the "correct" photograph. For example, the prosecutor might "indicate to the witness that [he has] other evidence that one of the persons pictured committed the crime," [11] and might even point to a particular photograph and ask whether the person pictured "looks familiar." More subtly, the prosecutor's inflection, facial expressions, physical motions, and myriad other almost imperceptible means of communication might tend, intentionally or unintentionally, to compromise the witness' objectivity. Thus, as is the case with lineups, "[i]mproper photographic identification procedures, . . . by exerting a suggestive influence upon the witnesses, can often lead to an erroneous identification . . . ." P. Wall, *supra*, at 89.[12] And "[r]egardless of how the initial misidentification comes about, the wit-

[11] *Simmons* v. *United States*, *supra*, at 383.

[12] The Court maintains that "the ethical responsibility of the prosecutor" is in itself a sufficient "safeguard" against impermissible suggestion at a photographic display. See *ante*, at 320. The same argument might, of course, be made with respect to lineups. Moreover, it is clear that the "prosecutor" is not always present at such pretrial displays. Indeed, in this very case, one of the four eyewitnesses was shown the color photographs on the morning of trial by an agent of the FBI, *not* in the presence of the "prosecutor." See 149 U. S. App. D. C., at 5, 461 F. 2d, at 96. And even though "the ethical responsibility of the prosecutor" might be an adequate "safeguard" against *intentional* suggestion, it can hardly be doubted that a "prosecutor" is, after all, only human. His behavior may be fraught with wholly *unintentional* and indeed unconscious nuances that might effectively suggest the "proper" response. See P. Wall, *supra*, n. 9, at 26–65; Napley, Problems of Effecting the Presentation of the Case for a Defendant, 66 Col. L. Rev. 94, 98–99 (1966); Williams & Hammelmann, Identification Parades–I, [1963] Crim. L. Rev. 479, 483. See also *United States* v. *Wade*, supra, at 229, 235, 236. And, of course, as *Wade* itself makes clear, unlike other forms of unintentional prosecutorial "manipulation," even unintentional suggestiveness at an identification procedure involves serious risks of "freezing" the witness' mistaken identification and creates almost insurmountable obstacles to reconstruction at trial.

ness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen . . . ." *Simmons* v. *United States, supra,* at 383–384.[13] As a result, " 'the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial.' " *United States* v. *Wade, supra,* at 229, quoting Williams & Hammelmann, *supra,* at 482.

Moreover, as with lineups, the defense can "seldom reconstruct" at trial the mode and manner of photographic identification. It is true, of course, that the photographs used at the pretrial display might be preserved for examination at trial. But "it may also be said that a photograph can preserve the record of a lineup; yet this does not justify a lineup without counsel." 149 U. S. App. D. C., at 9–10, 461 F. 2d, at 100–101. Cf. *United States* v. *Wade, supra,* at 239 and n. 30. Indeed, in reality, preservation of the photographs affords little protection to the unrepresented accused. For, although retention of the photographs may mitigate the dangers of misidentification due to the suggestiveness of the photographs themselves, it cannot in any sense reveal to defense counsel the more subtle, and therefore more dangerous, suggestiveness that might derive from the manner in which the photographs were displayed or any accompanying comments or gestures. Moreover, the accused cannot rely upon the witnesses themselves to expose these latter sources of suggestion, for the witnesses are not "apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect" since the witnesses are hardly "likely to be schooled in the detection of suggestive influences." *Id.,* at 230.

[13] See also P. Wall, *supra,* n. 9, at 68; Napley, *supra,* n. 12, at 98–99; Williams & Hammelmann, *supra,* n. 12, at 484; Comment, *supra,* n. 9, at 411–413; Note, *supra,* n. 10, at 1023.

Finally, and *unlike* the lineup situation, the accused himself is not even present at the photographic identification, thereby reducing the likelihood that irregularities in the procedures will ever come to light. Indeed, in *Wade*, the Government itself observed: [14]

> "When the defendant is present—as he is during a lineup—he may personally observe the circumstances, report them to his attorney, and (if he chooses to take the stand) testify about them at trial. . . . [I]n the absence of an accused, on the other hand, there is no one present to verify the fairness of the interview or to report any irregularities. If the prosecution were tempted to engage in 'sloppy or biased or fraudulent' conduct . . . , it would be far more likely to do so when the accused is absent than when he himself is being 'used.' "

Thus, the difficulties of reconstructing at trial an uncounseled photographic display are at least equal to, and possibly greater than, those involved in reconstructing an uncounseled lineup.[15] And, as the Government ar-

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[14] Brief for United States 24–25 in *United States* v. *Wade*, No. 334, O. T. 1966.

[15] The Court's assertion, *ante*, at 317–319 and n. 10, that these difficulties of reconstruction are somehow minimized because the defense can "duplicate" a photographic identification reflects a complete misunderstanding of the issues in this case. Aside from the fact that lineups can also be "duplicated," the Court's assertion is wholly inconsistent with the underlying premises of both *Wade* and *Gilbert*. For, unlike the Court today, the Court in both of those decisions recognized a critical difference between "systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like," on the one hand, and eyewitness identification, on the other. *United States* v. *Wade*, *supra*, at 227; *Gilbert* v. *California*, 388 U. S. 263, 267 (1967). In essence, the Court noted in *Wade* and *Gilbert* that, in the former situations, the accused can preserve his right to a fair trial simply by "duplicating" the tests of the Government, thereby enabling him to expose any errors in the Gov-

gued in *Wade*, in terms of the need for counsel, "[t]here is no meaningful difference between a witness' pretrial identification from photographs and a similar identification made at a lineup." [16] For, in both situations "the accused's inability effectively to reconstruct at trial any unfairness that occurred at the [pretrial identification] may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *United States* v. *Wade, supra*, at 231–232. As

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ernment's analysis. Such "duplication" is possible, however, *only* because the accused's tests can be made *independently* of those of the Government—that is, any errors in the Government's analyses cannot affect the reliability of the accused's tests. That simply is not the case, however, with respect to eyewitness identifications, whether corporeal or photographic. Due to the "freezing effect" recognized in *Wade*, once suggestion has tainted the identification, its mark is virtually indelible. For once a witness has made a mistaken identification, " 'he is not likely to go back on his word later on.' " *United States* v. *Wade, supra*, at 229. As a result, any effort of the accused to "duplicate" the initial photographic display will almost necessarily lead to a reaffirmation of the initial misidentification.

The Court's related assertion, that "equality of access" to the results of a Government-conducted photographic display "remove[s] any inequality in the adversary process," *ante*, at 319, is similarly flawed. For due to the possibilities for suggestion, intentional or unintentional, the so-called "equality of access" is, in reality, skewed sharply in favor of the prosecution.

[16] Brief for United States 7, in *United States* v. *Wade, supra*. The Court seems to suggest that, under no circumstances, would it be willing "to go so far as to extend the right [to counsel] to a portion of the prosecutor's trial-preparation interviews with witnesses." *Ante*, at 317. This suggestion illustrates once again the Court's readiness in this area to ignore "real-world" considerations for the sake of "mere formalism." *Kirby* v. *Illinois*, 406 U. S., at 699 (BRENNAN, J., dissenting). Moreover, this suggestion demonstrates the Court's failure to appreciate the essential differences, outlined persuasively by the Court of Appeals, between "the prosecutor's trial-preparation interviews with witnesses" and pretrial identification procedures. See 149 U. S. App. D. C., at 10, 461 F. 2d, at 101.

a result, both photographic and corporeal identifications create grave dangers that an innocent defendant might be convicted simply because of his inability to expose a tainted identification. This being so, considerations of logic, consistency, and, indeed, fairness compel the conclusion that a pretrial photographic identification, like a pretrial corporeal identification, is a "critical stage of the prosecution at which [the accused is] 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" *Id.*, at 237, quoting *Powell* v. *Alabama*, 287 U. S., at 57.

IV

Ironically, the Court does not seriously challenge the proposition that presence of counsel at a pretrial photographic display is essential to preserve the accused's right to a fair trial on the issue of identification. Rather, in what I can only characterize a triumph of form over substance, the Court seeks to justify its result by engrafting a wholly unprecedented—and wholly unsupportable—limitation on the Sixth Amendment right of "the accused . . . to have the Assistance of Counsel for his defence." Although apparently conceding that the right to counsel attaches, not only at the trial itself, but at all "critical stages" of the prosecution, see *ante*, at 309–311, the Court holds today that, in order to be deemed "critical," the particular "stage of the prosecution" under consideration must, at the very least, involve the physical "presence of the accused," at a "trial-like confrontation" with the Government, at which the accused requires the "guiding hand of counsel." According to the Court a pretrial photographic identification does not, of course, meet these criteria.

In support of this rather crabbed view of the Sixth Amendment, the Court cites our decisions in *Coleman* v. *Alabama*, 399 U. S. 1 (1970), *Massiah* v. *United States*, 377 U. S. 201 (1964), *White* v. *Maryland*, 373 U. S. 59

(1963), and *Hamilton* v. *Alabama,* 368 U. S. 52 (1961). Admittedly, each of these decisions guaranteed the assistance of counsel in pretrial proceedings at least arguably involving the physical "presence of the accused," at a "trial-like confrontation" with the Government, at which the accused required the "guiding hand of counsel." [17] Moreover, as the Court points out, these decisions are consistent with the view that the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst,* 304 U. S. 458, 462–463 (1938). But, contrary to the Court's assumption, this is merely one *facet* of the Sixth Amendment guarantee, and the decisions relied upon by the Court represent, not the boundaries of the right to counsel, but mere applications of a far broader and more reasoned understanding of the Sixth Amendment than that espoused today.

The fundamental premise underlying *all* of this Court's decisions holding the right to counsel applicable at "critical" pretrial proceedings, is that a "stage" of the prosecution must be deemed "critical" for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary "to protect the fairness of *the trial itself.*" *Schneckloth* v. *Bustamonte,* 412 U. S., 218, 239 (1973) (emphasis added). Thus, in *Hamilton* v. *Ala-*

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[17] *Coleman, White,* and *Hamilton,* guaranteed the assistance of counsel at preliminary hearings and arraignments. *Massiah* held that incriminating statements of a defendant should have been excluded from evidence when it appeared that they were overheard by federal agents who, without notice to the defendant's lawyer, arranged a meeting between the defendant and an accomplice turned informant. Thus, it is at least questionable whether *Massiah* involved a "*trial-like* confrontation" with the Government.

bama, supra, for example, we made clear that an arraignment under Alabama law is a "critical stage" of the prosecution, not only because the accused at such an arraignment requires "the guiding hand of counsel," but, more broadly, because "[w]hat happens there may affect the whole trial." *Id.,* at 54. Indeed, to exclude counsel from a pretrial proceeding at which his presence might be necessary to assure the fairness of the subsequent trial would, in practical effect, render the Sixth Amendment guarantee virtually meaningless, for it would "deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.' " *Massiah* v. *United States, supra,* at 204, quoting *Spano* v. *New York,* 360 U. S. 315, 326 (1959) (DOUGLAS, J., concurring); see *Escobedo* v. *Illinois,* 378 U. S. 478, 484–485 (1964).

This established conception of the Sixth Amendment guarantee is, of course, in no sense dependent upon the physical "presence of the accused," at a "trial-like confrontation" with the Government, at which the accused requires the "guiding hand of counsel." On the contrary, in *Powell* v. *Alabama,* 287 U. S. 45 (1932), the seminal decision in this area, we explicitly held the right to counsel applicable at a stage of the pretrial proceedings involving *none* of the three criteria set forth by the Court today. In *Powell,* the defendants in a state felony prosecution were not appointed counsel until the very eve of trial. This Court held, in no uncertain terms, that such an appointment could not satisfy the demands of the Sixth Amendment, for " '[i]t is vain . . . to guarantee [the accused] counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.' " *Id.,* at 59. In other words, *Powell* made clear that, in order to preserve the accused's right to a fair trial and to "effective and substantial" [18] assist-

[18] 287 U. S., at 53.

ance of counsel at that trial, the Sixth Amendment guarantee necessarily encompasses a reasonable period of time before trial during which counsel might prepare the defense. Yet it can hardly be said that this preparatory period of research and investigation involves the physical "presence of the accused," at a "trial-like confrontation" with the Government, at which the accused requires the "guiding hand of counsel."

Moreover, despite the Court's efforts to rewrite *Wade* so as to suggest a precedential basis for its own analysis,[19] the rationale of *Wade* lends no support whatever to today's decision. In *Wade*, after concluding that compelled participation in a lineup does not violate the accused's right against self-incrimination,[20] the Court addressed the argument "that the assistance of counsel at the lineup was indispensable to protect Wade's most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined." 388 U. S., at 223–224. The Court then surveyed the history of the Sixth Amendment, and specifically concluded that that Amendment guarantees "counsel's assistance *whenever* necessary to assure a meaningful 'defence.'" *Id.*, at 225 (emphasis added).

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[19] See *ante*, at 313–316. In an effort to justify its contention that *Wade* itself in some way supports the Court's wooden analysis of the counsel guarantee, the Court points to the so-called "careful limitation of the Court's language [in *Wade*] to 'confrontations.'" *Ante*, at 315. But *Wade* involved a lineup which is, of course, a "confrontation." Thus, it is neither surprising, nor significant, that the Court interchangeably used such terms as "lineup," "confrontation" and "pretrial identification" as descriptive of the facts. Indeed, the *Wade* dissenters recognized that *Wade* logically applies, not only to lineups, but "to any other techniques employed to produce an identification . . . ." *United States* v. *Wade*, *supra*, at 251 (WHITE, J., concurring and dissenting).

[20] See *United States* v. *Wade*, *supra*, at 221–223.

Then, after examining this Court's prior decisions concerning the applicability of the counsel guarantee,[21] the Court stressed once again that a pretrial proceeding is a "critical stage" of the prosecution if "the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." *Id.*, at 227.

The Court next addressed the Government's contention that a lineup is "a mere preparatory step in the gathering of the prosecution's evidence, not different—for Sixth Amendment purposes—from various other preparatory steps, such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like." *Id.*, at 227. If the Court in *Wade* had even the remotest intention of embracing the wooden interpretation of the Sixth Amendment ascribed to it today, it could have rejected the Government's contention simply by pointing out the obvious fact that such "systematized or scientific analyzing" does not in any sense involve the physical "presence of the accused," at a "trial-like confrontation" with the Government, at which the accused requires the "guiding hand of counsel." But the Court offered not even the slightest hint of such

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[21] See *id.*, at 225–227. The Court's quotation of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), is particularly instructive:

" 'The rule sought by the State here, however, would make the trial no more than an appeal from the interrogation; and the "right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination" . . . . "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.' " ' " *United States* v. *Wade*, *supra*, at 226, quoting *Escobedo* v. *Illinois*, *supra*, at 487–488.

an approach. Instead, the Court reasoned that, in light of the scientific nature of such analyses,

> "the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; *they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial.*" *Id.*, at 227–228 (emphasis added).

Finally, after discussing the dangers of misidentification arising out of lineup procedures and the difficulty of reconstructing the lineup at trial, the Court noted that "[i]nsofar as the accused's conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him." *Id.*, at 235. The Court therefore concluded that "[s]ince it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.'" *Id.*, at 236–237.

Thus, contrary to the suggestion of the Court, the conclusion in *Wade* that a pretrial lineup is a "critical stage" of the prosecution did not in any sense turn on

the fact that a lineup involves the physical "presence of the accused" at a "trial-like confrontation" with the Government. And that conclusion most certainly did not turn on the notion that presence of counsel was necessary so that counsel could offer legal advice or "guidance" to the accused at the lineup. On the contrary, *Wade* envisioned counsel's function at the lineup to be primarily that of a trained observer, able to detect the existence of any suggestive influences and capable of understanding the legal implications of the events that transpire. Having witnessed the proceedings, counsel would then be in a position effectively to reconstruct at trial any unfairness that occurred at the lineup, thereby preserving the accused's fundamental right to a fair trial on the issue of identification.

There is something ironic about the Court's conclusion today that a pretrial lineup identification is a "critical stage" of the prosecution because counsel's presence can help to compensate for the accused's deficiencies as an observer, but that a pretrial photographic identification is not a "critical stage" of the prosecution because the accused is not able to observe at all. In my view, there simply is no meaningful difference, in terms of the need for attendance of counsel, between corporeal and photographic identifications. And applying established and well-reasoned Sixth Amendment principles, I can only conclude that a pretrial photographic display, like a pretrial lineup, is a "critical stage" of the prosecution at which the accused is constitutionally entitled to the presence of counsel.

Syllabus

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, NEW YORK CITY REGION OF NEW YORK CONFERENCE OF BRANCHES, ET AL. *v.* NEW YORK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 72–129. Argued February 27–28, 1973—Decided June 21, 1973

Sections 4 and 5 of the Voting Rights Act of 1965, as amended, are designed to prohibit the use of tests or devices, or the alteration of voting qualifications or procedures, when the purpose or effect is to deprive a citizen of his right to vote. Sections 4 and 5 apply in any State or political subdivision thereof which the Attorney General determines maintained on November 1, 1964, or November 1, 1968, any "test or device," and with respect to which the Director of the Census Bureau determines that less than half the voting-age residents were registered, or that less than half voted in the presidential election of that November. These determinations are effective on publication and are not judicially reviewable. Publication suspends the effectiveness of the test or device, which may not then be utilized unless a three-judge District Court for the District of Columbia determines that no such test or device has been used during the 10 preceding years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." Section 4 (a) provides for direct appeal to the Supreme Court. The State or political subdivision may also institute an action pursuant to § 5 in the District Court for the District of Columbia, for a declaratory judgment that a proposed alteration in voting qualifications or procedures "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The statute also permits the change to be enforced without the court proceeding if it has been submitted to the Attorney General and he has not interposed an objection within 60 days. Neither the Attorney General's failure to object nor a § 5 declaratory judgment bars a subsequent private action to enjoin enforcement of the change. Such an action shall also be determined by a three-judge court and is appealable to the Supreme

Court. The Attorney General, on July 31, 1970, filed with the Federal Register his determination that New York on November 1, 1968, maintained a test or device as defined in the Act, and this was published the next day. On March 27, 1971, the Federal Register published the Census Director's determination that in the counties of Bronx, Kings, and New York, "less than 50 per centum of the persons of voting age residing therein voted in the presidential election of November 1968." New York State filed an action on December 3, 1971, seeking a judgment declaring that during the preceding 10 years the three counties had not used the State's voting qualifications "for the purpose or with the effect of denying or abridging the right to vote on account of race or color" and that §§ 4 and 5 were thus inapplicable to the counties. Pursuant to stipulation, the United States filed its answer on March 10, 1972, alleging, *inter alia*, that it was without knowledge or information to form a belief as to the truth of New York's allegation that the literacy tests were not administered discriminatorily. On March 17, New York filed a motion for summary judgment, supported by affidavits, and on April 3 the United States formally consented to the entry of the declaratory judgment sought by the State. Appellants filed their motion to intervene on April 7. New York opposed the motion claiming that: it was untimely, as the suit had been pending for more than four months; it had been publicized in early February, and appellants did not deny that they knew the action was pending; appellants failed to allege appropriate supporting facts; no appellant claimed to be a victim of voting discrimination; appellants' interests were adequately represented by the United States; delay would prejudice impending elections; and appellants still could raise discrimination issues in the state and federal courts of New York. On April 13 the three-judge court denied the motion to intervene and granted summary judgment for New York. While the appeal was pending, it was disclosed that the attorney who executed affidavits for appellants had not begun employment with appellant NAACP Legal Defense & Education Fund, Inc., until March 9, 1972, and that Justice Department attorneys met with two individual appellants in January 1972 during the course of their investigation. *Held:*

1. The words "any appeal" in § 4 (a) encompass an appeal by a would-be, but unsuccessful, intervenor, and appellants' appeal properly lies to this Court. Pp. 353–356.

2. The motion to intervene was untimely, and in the light of that fact and all the other circumstances of this case, the District

Court did not abuse its discretion in denying the motion. Pp. 364–369.

Affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., *post*, p. 369, and BRENNAN, J., *post*, p. 372, filed dissenting opinions. MARSHALL, J., took no part in the consideration or decision of the case.

Jack Greenberg argued the cause for appellants. With him on the briefs were *James M. Nabrit III*, *Eric Schnapper*, *Nathaniel R. Jones*, and *Wiley Branton*.

A. Raymond Randolph, Jr., argued the cause for the United States. With him on the brief were *Solicitor General Griswold* and *Assistant Attorney General Norman*. *George D. Zuckerman*, Assistant Attorney General of New York, argued the cause for appellee the State of New York. With him on the brief were *Louis J. Lefkowitz*, Attorney General, *Samuel A. Hirshowitz*, First Assistant Attorney General, *John G. Proudfit*, Assistant Attorney General, and *Judith T. Kramer*, Deputy Assistant Attorney General.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This appeal from a three-judge district court for the District of Columbia comes to us pursuant to the direct-review provisions of § 4 (a) of the Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 438, as amended, 42 U. S. C. § 1973b (a).[1] The appellants[2] seek review of

[1] "To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made

[*Footnote 2 is on p. 348*]

an order dated April 13, 1972, unaccompanied by any opinion, denying their motion to intervene [3] in a suit that had been instituted against the United States by

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under subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color . . . .

"An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color.

"If the Attorney General determines that he has no reason to believe that any such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment."

[2] The appellants describe themselves, in their motion to intervene, as the National Association for the Advancement of Colored People, New York City Region of New York State Conference of Branches; four duly qualified black voters in Kings County, New York; and one duly qualified Puerto Rican voter in that county. Two of the individual appellants are also members of the New York State Assembly and another is a member of the New York State Senate. App. 44a.

[3] The motion, App. 44a–47a, does not differentiate between intervention of right and permissive intervention, under subdivisions (a) and (b), respectively, of Fed. Rule Civ. Proc. 24. Neither does it state that one, rather than the other, is claimed. At oral argument, counsel said that in the District Court the appellants sought intervention as of right. Tr. of Oral Arg. 8. In this Court appellants suggest that they were also entitled to permis-

the State of New York, on behalf of its counties of New York, Bronx, and Kings. New York's action was one for a judgment declaring that, during the 10 years preceding the filing of the suit, voter qualifications prescribed by the State had not been used by the three named counties "for the purpose or with the effect of denying or abridging the right to vote on account of race or color," within the language and meaning of § 4 (a), and that the provisions of §§ 4 and 5 of the Act, as amended, 42 U. S. C. §§ 1973b and 1973c, are, therefore, inapplicable to the three counties.

In addition to denying the appellants' motion to intervene, the District Court, by the same order, granted New York's motion for summary judgment. This was based upon a formal consent by the Assistant Attorney General in charge of the Civil Rights Division, on behalf of the United States, consistent with the Government's answer theretofore filed, "to the entry of a declaratory judgment under Section 4 (a) of the Voting Rights Act of 1965 (42 U. S. C. 1973b (a))," App. 39a. The consent was supported by an accompanying affidavit reciting, "I conclude, on behalf of the Acting Attorney General that there is no reason to believe that a literacy test has been used in the past 10 years in the counties of New York, Kings and Bronx with the purpose or effect of denying or abridging the right to vote on account of race or color, except for isolated instances which have been substantially corrected and which, under present practice cannot reoccur." App. 42a–43a.

Appellants contend here that their motion to intervene should have been granted because (1) the United States unjustifiably declined to oppose New York's mo-

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sive intervention. Tr. of Oral Arg. 9; Brief for Appellants 26 n. 39. In view of our ruling on the issue of timeliness, we make no point of the distinction between the two types of intervention.

tion for summary judgment; (2) the appellants had initiated other litigation in the United States District Court for the Southern District of New York to compel compliance with §§ 4 and 5 of the Act; and (3) the appellants possessed "substantial documentary evidence," Jurisdictional Statement 7, to offer in opposition to the entry of the declaratory judgment.

Faced with the initial question whether this Court has jurisdiction, on direct appeal, to review the denial of the appellants' motion to intervene, we postponed determination of that issue to the hearing of the case on the merits. 409 U. S. 978.

I

Section 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973,[4] clearly indicates that the purpose of the Act is to assist in the effectuation of the Fifteenth Amendment, even though that Amendment is self-executing, and to insure that no citizen's right to vote is denied or abridged on account of race or color. *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966); *Apache County* v. *United States*, 256 F. Supp. 903 (DC 1966). Sections 4 and 5, 42 U. S. C. §§ 1973b and 1973c, are designed to prohibit the use of tests or devices, or the alteration of voting qualifications or procedures, when the effect is to deprive a citizen of his right to vote. Section 4 (c) defines the phrase "test or device" to mean

> "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational

[4] "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class." 42 U. S. C. § 1973b (c).

Section 4 (b), as amended, now applies in any State or in any political subdivision of a State which the Attorney General determines maintained on November 1, 1964, or November 1, 1968, any "test or device," and with respect to which the Director of the Bureau of the Census determines that less than half the residents of voting age there were registered on the specified date, or that less than half of such persons voted in the presidential election of that November. These determinations are effective upon publication in the Federal Register and are not reviewable in any court. 42 U. S. C. § 1973b (b).

The prescribed publication in the Federal Register suspends the effectiveness of the test or device, and it may not then be utilized unless a three-judge district court for the District of Columbia determines, by declaratory judgment, that no such test or device has been used during the 10 years preceding the filing of the action "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." § 4 (a), 42 U. S. C. § 1973b (a). The same section states that "any appeal shall lie to the Supreme Court." And the District Court "shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color."

Section 5, 42 U. S. C. § 1973c, applies whenever a State or political subdivision with respect to which a determination has been made under § 4 (b) "shall enact

or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on November 1, 1964, or November 1, 1968.[5] The State or political subdivision may then institute an action in the United States District Court for the District of Columbia for a declaratory judgment that what was done "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Unless and until the court enters such judgment "no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure." The statute contains a proviso, however, that the change may be enforced without the court proceeding if it has been submitted to the Attorney General of the United States and he "has not interposed an objection within sixty days after such submission." Neither the Attorney General's failure to object nor a declaratory judgment entered under § 5 shall bar a subsequent action by a private party to enjoin enforcement of the change. Here again, the action shall be determined by a three-judge court "and any appeal shall lie to the Supreme Court."

II

On July 31, 1970, the Attorney General filed with the Federal Register his determination that New York on November 1, 1968, maintained a test or device as defined in § 4 (c) of the Act. This was published the following day. 35 Fed. Reg. 12354. On March 27, 1971, there was published in the Federal Register the determination

[5] In *Georgia* v. *United States*, 411 U. S. 526 (1973), the Court held that a State's reapportionment plan, which has the potential for diluting Negro voting power, is a "standard, practice, or procedure with respect to voting," within the meaning of § 5 of the Act. See *Allen* v. *State Board of Elections*, 393 U. S. 544 (1969).

by the Director of the Bureau of the Census that in the counties of Bronx, Kings, and New York, in the State of New York, "less than 50 per centum of the persons of voting age residing therein voted in the presidential election of November 1968." 36 Fed. Reg. 5809.

The present action was instituted by the State of New York with the filing of its original complaint on December 3, 1971, in the United States District Court for the District of Columbia. The appellants contend that the District Court's order denying them intervention in that action is directly appealable to this Court under § 4 (a) of the Act.

The United States "substantially" agrees that this Court has jurisdiction to review on direct appeal the denial of intervention in an action of this kind.[6] Brief for United States 21 n. 15. New York suggests that the appeal should be dismissed because the appellants have not established intervention as of right and have not demonstrated an abuse of discretion by the District Court in denying permissive intervention. Brief for Appellee 22–23. We must determine for ourselves, of course, the scope of our jurisdiction, since "jurisdiction of the federal courts—their power to adjudicate—is a grant of authority to them by Congress and thus beyond the scope of litigants to confer." *Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 167 (1939); *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934).

The jurisdictional issue is simply phrased: whether "any appeal," within the language of the second paragraph of § 4 (a), includes an appeal by a would-be, but unsuccessful, intervenor. Certainly, the words "any appeal" are subject to broad construction; they could be said to include review of any meaningful judicial determi-

[6] But see Hearings on H. R. 6400 before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, pp. 90–91 (1965).

nation made in the progress of the § 4 lawsuit. That Congress intended a broad meaning is apparent from its expressed concern that voting restraints on account of race or color should be removed as quickly as possible in order to "open the door to the exercise of constitutional rights conferred almost a century ago." H. R. Rep. No. 439, 89th Cong., 1st Sess., 11 (1965). See S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 6–7 (1965). Indeed, the Voting Rights Act of 1965 was an addition to, and buttressed, § 2004 of the Revised Statutes, as that section had been amended by the respective Civil Rights Acts of 1957, 1960, and 1964, 71 Stat. 637, 74 Stat. 90, and 78 Stat. 241, codified as 42 U. S. C. § 1971. When the 1965 Act was under consideration by the Congress, § 1971 (c) already empowered the Attorney General to institute a civil action to protect the right to vote from deprivation because of race or color or from interference by threat, coercion, or intimidation. Section 1971 (g) further provided that, in such a suit, the Attorney General could request a three-judge court, and "it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date . . . and to cause the case to be in every way expedited." Further, an appeal from the final judgment of that court was to the Supreme Court.

Despite this existing statutory provision designed to hasten the removal of barriers to the right to vote, the Congress determined, in 1965, that the enforcement of the voting rights statutes "has encountered serious obstacles in various regions of the country," and progress "has been painfully slow, in part because of the intransigence of State and local officials and repeated delays in the judicial process." H. R. Rep. No. 439, *supra*, at 9. See *South Carolina* v. *Katzenbach*, 383 U. S., at 309–315, and *Allen* v. *State Board of Elections*, 393 U. S. 544, 556 n. 21 (1969). Congress thus produced

the Voting Rights Act of 1965 in response to this recognized problem and provided in that Act that "any appeal" in a § 4 (a) three-judge proceeding shall lie to this Court. This contrasts with the language in the earlier theretofore existing statute providing for an appeal here only "from the final judgment" of the three-judge court. § 1971 (g). The broader language of § 4 (a), when viewed in the light of Congress' concern about hastening the resolution of suits involving voting rights, see *Apache County* v. *United States*, 256 F. Supp., at 907, prompts us to conclude that the unsuccessful intervenor's § 4 (a) appeal is directly here and not to the Court of Appeals.

This conclusion is not without other relevant statutory precedent. It has long been settled that an unsuccessful intervenor in a government-initiated civil antitrust action may appeal directly to this Court under § 2 of the Expediting Act, 15 U. S. C. § 29.[7] *United States* v. *California Canneries*, 279 U. S. 553, 559 (1929); *Sutphen Estates* v. *United States*, 342 U. S. 19, 20 (1951); *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129, 132 (1967).

Earlier this Term, in *Tidewater Oil Co.* v. *United States*, 409 U. S. 151 (1972), we held that § 2 of the Expediting Act lodged in this Court exclusive appellate jurisdiction over interlocutory, as well as final, orders in Government civil antitrust cases. In so holding, we emphasized Congress' determination "to speed appellate review." *Id.*, at 155. As we have noted above, Congress has expressed a similar need for speed in adjudicating voting rights cases. We could not justify dissimilar treatment to an unsuccessful intervenor under the parallel § 4 (a) of the Civil Rights Act.

[7] "In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

Further support for this result is supplied when one contrasts the specific appeal provision of § 4 (a) with 28 U. S. C. § 1253,[8] allowing for a direct appeal to this Court from an order granting or denying an interlocutory or permanent injunction "in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." That section provides that "any party" may appeal here except "as otherwise provided by law." Section 4 (a) does not incorporate or refer to § 1253. The former relates to "any appeal"; the latter speaks only of "any party." The difference is obvious, and the broader purport of Congress under § 4 (a) is manifest.

We conclude, therefore, that this Court has jurisdiction, on direct appeal by one denied intervention in a § 4 (a) action, to determine whether the District Court erred in denying the motion to intervene.

III

As originally enacted, §§ 4 and 5 of the Voting Rights Act of 1965 related only to a period of five preceding years, to a test or device in effect on November 1, 1964, to a paucity of persons registered on that date, and to a paucity of voters in the presidential election of 1964. 79 Stat. 438, 439. In 1970, however, Congress enacted the Voting Rights Act Amendments of 1970. Pub. L. 91–285, 84 Stat. 314. This new legislation, among other things, related §§ 4 and 5 to ten, rather than five, preceding years and, in addition to the November 1, 1964, date and the presidential election of that year, to No-

[8] "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

vember 1, 1968, and the 1968 election. Also, the 1970 Act suspended the use of any test or device "in any Federal, State, or local election" prior to August 6, 1975, without regard to whether a determination has been made that § 4 covered a particular State or political subdivision. 42 U. S. C. § 1973aa. See *Oregon* v. *Mitchell*, 400 U. S. 112, 131–132 (1970) (opinion of Black, J.).

The three New York counties that the present litigation concerns were not covered by §§ 4 and 5 of the original 1965 Act. They became subject thereto because of the provisions of the 1970 Act and the respective published determinations, hereinabove described, of the Attorney General and the Director of the Bureau of the Census. Indeed, it is clear that the three counties were a definite target of the 1970 amendments. See, *e. g.*, 116 Cong. Rec. 6659 (1970) (remarks of Sen. Cooper), *id.*, at 20161 and 20165 (remarks of Congs. Celler and Albert, respectively).

It was in December 1971, during the pendency of state legislative proceedings for the redrafting of congressional and state senate and assembly district lines,[9] that the State of New York filed its complaint in the present

[9] Although the Director of the Bureau of the Census determined, on March 15, 1971, that less than 50% of the persons of voting age residing in the three named New York counties voted in the presidential election of November 1968, it was stated on behalf of the appellees in oral argument that a complete set of census statistics was not available to the State of New York until October 15, 1971. Tr. of Oral Arg. 41. The appellants, however, in the complaint filed by them in the United States District Court for the Southern District of New York in their § 5 suit against the New York City Board of Elections and others, No. 72 Civ. 1460, alleged that census information on which reapportionment was based was made available to the State no later than September 1, 1971. App. 59a. We do not know which of these dates is correct. It is clear, in any event, that census data for the redrawing of congressional and legislative district lines was not available to New York until the fall of 1971.

action.[10] The amended complaint, filed 13 days later, alleged that certain of the State's qualifications for registration and voting, prescribed by New York's Constitution, Art. II, § 1, and by its Election Law, §§ 150 and 168, as amended (the ability to read and write English, the administration of a literacy test, and the presentation of evidence of literacy in lieu of the test), had not been used during the preceding 10 years "for the purpose or with the effect of denying or abridging the right to vote on account of race or color," App. 6a; that the State's literacy requirements were suspended in 1970 and remained suspended; that after enactment of the 1965 Act, the New York City Board of Elections provided English-Spanish affidavits to be executed in lieu of a diploma or certificate in conformity with the requirements of the Act; and that, beginning in 1964 and continuing through 1971, with the exception of 1967, there were voter registration drives every summer designed to increase the number of registered voters in the three named counties.

New York and the United States stipulated that the Government could file its answer or other pleading by March 10, 1972. The answer was filed on that day. The Government therein admitted that English-Spanish affidavits were provided by the City Board of Elections but averred, on information and belief, that such affidavits

[10] New York claims that the primary reason for filing its § 4 (a) suit was to insure that the imminent 1972 elections would be held on the basis of district lines drawn according to population figures from the 1970 census. It is said that the lateness in obtaining the figures, see n. 9, *supra*, and the concomitant impossibility of redrawing lines before early 1972 made it highly unlikely that the State would be able to obtain from the Attorney General of the United States any § 5 clearance for the redistricting legislation prior to April 4, the first day for circulating nominating petitions for the June 20 primary. Thus, by obtaining a favorable result in a § 4 (a) suit, New York could bypass the submission of its redistricting plan to the Attorney General. Tr. of Oral Arg. 41–42.

were not so provided prior to 1967. The answer also alleged that the United States was without knowledge or information sufficient to form a belief as to the truth of the plaintiff's allegation that the literacy tests were administered with no intention or effect to abridge or deny the right to vote on the basis of race or color.

On March 17 New York filed its motion for summary judgment. This was supported by affidavits from the Administrator for the Board of Elections in the City of New York "which includes the counties of New York, Bronx and Kings," the Chief of the Bureau of Elementary and Secondary Educational Testing of the New York State Education Department, and the respective Chief Clerks of the New York, Bronx, and Brooklyn Borough Offices of the New York City Board of Elections. App. 15a–32a. These affidavits stated that those instances where the suspension of literary tests had been ignored or overlooked by election officials were isolated and that steps had been taken to resolve that problem. The affidavits also stated that since 1964, with the exception of 1967, the Board of Elections had conducted summer voter-registration drives directed particularly to high-density black population areas. In its memorandum, filed with the District Court, in support of its motion, New York presented a history of its use of literacy tests [11] and concluded, "[s]ince it was never the practice of administering the tests to discriminate against any person on account

[11] The New York Election Law, § 168, as amended, provides that "a new voter may present as evidence of literacy" a certificate that he has completed the sixth grade of an approved elementary school or of a school "accredited by the Commonwealth of Puerto Rico in which school instruction is carried on predominately in the English language." On July 28, 1966, the State's Attorney General issued an opinion to the effect that New York may not require literacy in English from persons educated in Puerto Rico. Op. Atty. Gen. N. Y., 1966, pp. 121, 123.

of race or color, and since the filing requirements of the Voting Rights Act are leading to delays which may well disrupt the political process in New York, this action for declaratory judgment has been brought." Memorandum 4–5. See *South Carolina* v. *Katzenbach*, 383 U. S., at 332.

Two and one-half weeks later, on April 3, the United States filed its formal consent, hereinabove described, to the entry of the declaratory judgment for which New York had moved. The accompanying affidavit of the Assistant Attorney General stated that the Department of Justice had conducted "an investigation which consisted of examination of registration records in selected precincts in each covered county, interviews of certain election and registration officials and interviews of persons familiar with registration activity in black and Puerto Rican neighborhoods in those counties." App. 40a. The Assistant Attorney General then reached the conclusion, App. 42a–43a, quoted *supra*, at 349.

Appellants' motion to intervene was filed April 7. Appellants asserted that if New York were successful in the present action, the appellants would be deprived of the protections afforded by §§ 4 and 5; that they "would be legally bound" thereby in their simultaneously filed § 5 action in the Southern District of New York; and that the latter action "would necessarily fail." App. 45a.[12]

[12] While the present case was pending in the District Court, the New York Legislature on January 14, 1972, completed its work of redrawing assembly and senate district lines and enacted legislation altering those boundaries. N. Y. Laws 1972, c. 11. On January 24, the State's Attorney General submitted the redistricting plan to the Attorney General of the United States pursuant to § 5 of the 1965 Act, as amended, 42 U. S. C. § 1973c. On March 14, three days before New York's motion for summary judgment was filed, the United States Attorney General rejected New York's submission on the ground that it was lacking in information required by the applicable regulations set forth at 36 Fed. Reg. 18186–18190 (1971). On March 28

The appellants also alleged that the § 5 suit asserted that New York "has gerrymandered Assembly, Senatorial and Congressional districts in Kings, Bronx and New York counties so that, on purpose and in effect, the right to vote will be denied on account of race or color." *Ibid.* Thus, it was said, the disposition of the present suit might impair or impede the appellants' ability to protect their interests in registering to vote, voting, and seeking public office. App. 46a. It was further claimed that during the preceding three weeks attorneys in the Department of Justice thrice had represented to appellants' counsel that the United States would oppose New York's motion for summary judgment.[13] "At no time did any of the three Justice Department attorneys . . . inquire of counsel for [appellants] whether he or any of the [appellants] had information or evidence which would support the government's alleged position that sections 4 and 5 of the Voting Rights Act should continue to be applied to Kings, Bronx and New York counties." *Ibid.*

There was also filed an affidavit of Eric Schnapper, one of the attorneys for the appellants. This repeated the allegations contained in the motion to intervene and also asserted that on March 21 the affiant advised a Department of Justice attorney that when the New York redistricting laws were submitted to the Department, he wished to submit material and arguments in opposition to their approval; that on March 23 he was advised by another Department attorney that papers were being

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the New York Legislature enacted legislation redefining the boundaries of the State's congressional districts. N. Y. Laws 1972, c. 76. The congressional changes were not submitted for approval under § 5.

[13] The United States takes the position "that the statements of appellants' counsel are not an accurate representation of the conversations between him and these government attorneys." Brief for United States 47.

prepared in opposition to New York's motion for summary judgment; that he informed the attorney that the appellants were considering the institution of an action in the Southern District of New York; that on April 3 he was advised by the Department of Justice that it would have no objection to the institution of the New York suit; and that in the afternoon of April 5 he was informed by telephone for the first time that two days earlier the United States had consented to New York's motion for summary judgment. App. 48a–51a.

With the motion to intervene the appellants filed a proposed answer to appellees' amended complaint and a brief memorandum of points and authorities. The latter suggested the failure of the Attorney General "to investigate the relevant facts," namely, "whether there are differences in the literacy rates of whites and nonwhites, particularly if they are do [*sic*] to unequal or discriminatory public education. *Gaston County* v. *United States,* 395 U. S. 285 (1969)." This suggestion was also made in the proposed answer. App. 65a–66a.

The United States took no position with respect to the appellants' motion to intervene. New York opposed the motion on six grounds. The first was untimeliness in that the suit had been pending for more than four months, an article about it had appeared in early February in the New York Times, and the appellants did not deny that they had knowledge of the pendency of the action. The second was failure to allege appropriate supporting facts. The third was the lack of a requisite interest in that none of the appellants asserted he was a victim of discriminatory application of the literacy test; rather, the motion to intervene was subordinate to the appellants' real interest in invalidating New York's reapportionment of its assembly, senate, and congressional districts, as evidenced by the institution of their action in the Southern District of New York. The fourth

was adequate representation of the appellants' interest by the United States. The fifth was that delay in the granting of the motion for summary judgment would prejudice New York and jeopardize the impending primary elections for offices of Assembly, Senate, and Congress, as well as for delegates to the upcoming Democratic National Convention. The sixth was that the appellants and others who claimed discrimination still could raise those issues in the state and federal courts of New York. Plaintiff's Memorandum of Law in Opposition to the Motion to Intervene 1–8. Like reasons were asserted in a supporting affidavit of an Assistant New York Attorney General. App. 67a–70a.

On April 13 the three-judge court entered its order denying the appellants' motion to intervene and granting summary judgment for New York. App. 71a–72a.

On April 24 the appellants filed a motion to alter judgment on the ground, among others, that their motion to intervene was timely since neither the appellants nor their counsel knew of the § 4 (a) action until March 21.[14] The appellants now asserted that evidence was available to demonstrate that in the three counties education af-

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[14] Mr. Schnapper filed a further affidavit on April 24, 1972. In it he stated (1) that prior to March 21, 1972, he had no knowledge whatever of the commencement, pendency, or existence of the § 4 (a) action; (2) that throughout December 1971 and January and February 1972 he was in New Hampshire and the daily paper he regularly read there did not carry any story about the present suit; (3) that to the best of his knowledge neither co-counsel nor any of the appellants knew of the suit prior to March 21; (4) that he did not receive New York's memorandum in opposition to the motion to intervene until April 13, after the District Court already had ruled on the motion; (5) that he did not learn of the consent by the United States to the entry of judgment until April 5; and (6) that the motion to intervene, as well as the papers in the § 5 action in the Southern District of New York, was drafted "throughout the night of April 6–7." App. 91a–92a.

forded nonwhite children by New York was substantially inferior to that afforded white children and that "this difference resulted in disparities in white and non-white illiteracy rates among persons otherwise eligible to vote in those counties during the 10 years prior to the filing of the instant action." App. 73a–74a. Thus "a full evidentiary hearing is required before making any finding of fact as to whether plaintiff's literacy tests discriminated on the basis of race." Finally, the appellants asserted that the District Court "should not have approved the consent judgment desired by plaintiff and defendant without first soliciting the intervention of responsible interested parties and requiring the United States to undertake a more thorough investigation of the relevant facts." *Ibid.*

The District Court promptly denied the Motion to Alter Judgment. App. 117a.

Subsequently, while the appeal was pending in this Court, two additional facts came to light and are authorized by the parties for our consideration. The first is that Mr. Schnapper, who executed the above-described affidavits, did not begin his employment as an attorney with the NAACP Legal Defense and Education Fund, Inc., until March 9, 1972. The second is that "Justice Department attorneys met with appellants Stewart and Fortune in January 1972 during the course of their investigation; although the Justice Department attorneys recall informing Stewart and Fortune that this case was pending, neither Stewart nor Fortune can remember being so informed." Reply Brief for Appellants 3 n. 1; Brief for United States 36.

IV

The foregoing detailed recital of the facts and of the history of the case is necessary because of the discretionary nature of the District Court's order we are called upon to review. Our task is to determine whether, upon

the facts available to it at that time, the court erred in denying the appellants' motion to intervene.

Intervention in a federal court suit is governed by Fed. Rule Civ. Proc. 24.[15] Whether intervention be claimed of right or as permissive, it is at once apparent, from the initial words of both Rule 24 (a) and Rule 24 (b), that the application must be "timely." If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness.[16] Although the point to which

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[15] "Rule 24.—INTERVENTION

"(a) Intervention of right.

"Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

"(b) Permissive intervention.

"Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

[16] *Iowa State University Research Foundation* v. *Honeywell, Inc.*, 459 F. 2d 447, 449 (CA8 1972); *Smith Petroleum Service, Inc.* v. *Monsanto Chemical Co.*, 420 F. 2d 1103, 1115 (CA5 1970); *Lumbermens Mutual Casualty Co.* v. *Rhodes*, 403 F. 2d 2, 5 (CA10), cert. denied, 394 U. S. 965 (1969); *Kozak* v. *Wells*, 278 F. 2d 104, 108–109 (CA8 1960); 7A C. Wright & A. Miller, Federal Practice and Pro-

the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances.[17] And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.[18]

With these accepted principles in mind, we readily conclude that the District Court's denial of the appellants' motion to intervene was proper because of the motion's untimeliness, and that the denial was not an abuse of the court's discretion:

1. The court could reasonably have concluded that appellants knew or should have known of the pendency of the § 4 (a) action because of an informative February article in the New York Times discussing the controversial aspect of the suit; [19] public comment by community leaders; the size and astuteness of the membership and staff of the organizational appellant; and the ques-

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cedure § 1916 (1972); 3B J. Moore, Federal Practice ¶ 24.13 [1] (2d. ed. 1969).

[17] *Iowa State University Research Foundation* v. *Honeywell, Inc.*, 459 F. 2d, at 449; *Smith Petroleum Service, Inc.* v. *Monsanto Chemical Co.*, 420 F. 2d, at 1115; *Kozak* v. *Wells*, 278 F. 2d, at 109.

[18] *McDonald* v. *E. J. Lavino Co.*, 430 F. 2d 1065, 1071 (CA5 1970); *Lumbermens Mutual Casualty Co.* v. *Rhodes*, 403 F. 2d, at 5; 3B J. Moore, Federal Practice ¶ 24.13, p. 24–524.

[19] The New York Times, Feb. 6, 1972, p. 48. This was the only news article on the page. Its three-column headline read, "Lefkowitz Acts to Bar Voting Watch." The article recited that New York's Attorney General "had moved in Federal Court in Washington to have the state exempted from potential Federal supervision over registration and voting" in the three counties. It mentioned an attack upon the suit by the Chairman of the Citizens Voter Education Committee, a Congressman, and the Manhattan and Bronx Borough Presidents, and described the Attorney General's reply to that attack.

tioning of two of the individual appellants themselves by Department of Justice attorneys investigating the use of literacy tests in New York.

2. We, however, need not confine our evaluation of abuse of discretion to the facts just mentioned, for the record amply demonstrates that appellants failed to protect their interest in a timely fashion after March 21, 1972, the date they allegedly were first informed of the pendency of the action. At that point, the suit was over three months old and had reached a critical stage. The United States had answered New York's complaint on March 10 and in that answer had clearly indicated that it was without knowledge or information sufficient to form a belief as to the truth of New York's allegation that the State's literacy tests were administered without regard to race or color. App. 13a. New York, in reliance upon this answer, then filed its motion for summary judgment. The only step remaining was for the United States either to oppose or to consent to the entry of summary judgment. This was the status of the suit at the time the appellants concede they were aware of its existence. It was obvious that there was a strong likelihood that the United States would consent to the entry of judgment since its answer revealed that it was without information with which it could oppose the motion for summary judgment. Thus, it was incumbent upon the appellants, at that stage of the proceedings, to take immediate affirmative steps to protect their interests either by supplying the Department of Justice with any information they possessed concerning the employment of literacy tests in a way designed to deny New York citizens of the right to vote on account of race or color, or by presenting that information to the District Court itself by way of an immediate motion to intervene.[20] Appel-

[20] See Hearings on H. R. 6400 before Subcommittee No. 5 of the

lants failed to take either of these affirmative steps. They chose, rather, to rely on representations said to have been made by Department of Justice attorneys during the course of telephone conversations. The content of the representations allegedly made by the attorneys is a matter of dispute. Brief for United States 46–47. Indeed, it appears from the affidavit filed by appellants' counsel in support of the motion to alter judgment that appellants were not preparing, prior to the "night of April 6–7," to file a motion to intervene or even to file their New York federal action seeking to enjoin the 1972 elections. See n. 14, *supra*.

3. It is also apparent that there were no unusual circumstances warranting intervention since (a) no appellant alleged an injury, personal to him, resulting from the discriminatory use of a literacy test, (b) appellants' claim of inadequate representation by the United States was unsubstantiated, (c) appellants would not be foreclosed from challenging congressional and state legislative redistricting plans on the grounds that they were the product of improper racial gerrymandering, cf. *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), and *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), (d) appellants were free to renew their motion to intervene following the entry of summary judgment since the District Court was required, under § 4 (a) of the Act, 42 U. S. C. § 1973b (a), to retain jurisdiction for five years after judgment, and, (e) in any event, no citizen of New York could be denied the right to vote in the near future since all literacy tests

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House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 2, pp. 91–93.

Appellants at oral argument acknowledged that they were not precluded from seeking intervention prior to the date on which the United States filed its consent to the entry of summary judgment. Tr. of Oral Arg. 18–19.

have been suspended until August 6, 1975. 42 U. S. C. § 1973aa.

4. Finally, in view of the then rapidly approaching primary elections in New York and of the final date for filing nominating petitions to participate in those elections, the granting of a motion to intervene possessed the potential for seriously disrupting the State's electoral process with the result that primary and general elections would then have been based on population figures from the 1960 census and more than 10 years old.

We therefore conclude that the motion to intervene was untimely and that the District Court did not abuse its discretion in denying the appellants' motion. See *Apache County* v. *United States*, 256 F. Supp. 903 (DC 1966); *United States* v. *Paramount Pictures, Inc.*, 333 F. Supp. 1100 (SDNY), aff'd *sub nom. Syufy Enterprises* v. *United States*, 404 U. S. 802 (1971). This makes it unnecessary for us to consider whether other conditions for intervention under Rule 24 were satisfied.

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, dissenting.

When two mighty political agencies such as the Department of Justice in Washington, D. C., and the Attorney General of New York in Albany agree that there is no racial discrimination in voting in three New York counties although the historic record[1] suggests it, it

[1] The Attorney General of New York protests this statement. But the 90-year-long segregated school system of last century is not the point; the reference is to the offer of proof made by the appellants. The Attorney General also states that the federal investigation showed that the inference has no basis in fact. He asserts moreover that New York's literacy requirement has no racial cast in

is time to take a careful look and not let this litigation be ended by an agreement between friendly political allies.

The Voting Rights Act Amendments of 1970 were specifically aimed at New York—particularly Bronx, Kings, and New York Counties. It was pointed out in the debates that under the earlier Act these counties were not included, that while in the 1964 election more than 50% of the voters were registered and more than 50% voted, in the 1968 election 50% were not registered or voting. 116 Cong. Rec. 6654, 6659. It was pointed out that New York's literacy requirement was enacted with the view of discriminating on the basis of race. *Id.*, at 6660. New York blacks were illiterate because their education, if any, had been in second-class schools elsewhere. *Id.*, at 6661. It was emphasized that wherever the blacks had been educated it was unconstitutional to discriminate against them on the basis of race even though illiterate. *Id.*, at 5533. The use of literacy tests in New York tended to deter blacks from registering, it was said. *Ibid.* And it was pointed out that literacy tests had a greater impact on blacks and other minorities than on any white because literacy was higher among whites. *Id.*, at 5532–5549.

In the face of this history, the United States did not call one witness or submit a single document or make even a feeble protest to New York's claim that it was lily-white. The United States has no defense to offer. The desultory way in which the United States acted is illustrated by the fact that although the Act requires

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practice. But appellants' offer of proof is disturbing to say the least. The case was disposed of on a motion for summary judgment. The case is in my view a classic example of the inappropriateness of such a procedure. As I state in my dissent, a hearing should have been held and findings of fact made.

the District Court to retain jurisdiction of the cause for five years, 42 U. S. C. § 1973b (a), the United States did not even make the request. It capitulated completely. And yet the blacks, the Americans of Puerto Rican ancestry, and other minorities victimized by illiteracy tests clamor in their way for representation. Only NAACP offers it in this case. The investigation made by the Department of Justice has all the earmarks of a whitewash.

The Attorney General had testified before Congress: [2]

> "[I]t is clear that Negro voting in most Deep South Counties subjected to both literacy test suspension and on-scene enrollment by Federal registrars is now *higher* than Negro vote participation in the ghettos of the two Northern cities—New York and Los Angeles—where literacy tests are still in use. In non-literacy test Northern jurisdictions like Chicago, Cleveland and Philadelphia, Negro registration and voting ratios are higher than in Los Angeles and (especially) New York. . . ."

Yet, none of these assertions were given the District Court nor was any attempt made to develop evidence along these lines.

This suit by the State of New York to get an exemption for the three counties started on December 3, 1971. On March 10, 1972, the United States filed its answer and on March 17, 1972, New York moved for summary judgment. On March 21, 1972, NAACP was advised by the Department of Justice that the latter would oppose New York's motion for summary judgment. Out of the blue the Department of Justice on April 4, 1972, consented to the entry of a decree exempting the three New

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[2] Hearings on H. R. 4249, etc., before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., ser. 3, p. 296 (1969).

York counties from the Act. The motion to intervene was promptly filed April 7, 1972.

The answer filed by NAACP on April 7, 1972, alleges that the literacy test administered by New York deterred minorities from registering, that it was administered by whites, that social gerrymandering was so widespread and successful that minorities were discouraged from voting, and that New York produced illiterate blacks through operating inferior black schools—inferior in educational facilities, inferior in teachers, and inferior in expenditures *per capita.*

It is assumed, of course, that the United States adequately represents the public interest in cases of this sort. But on the face of this record of transactions that the United States has approved or does not contest, it is clear that it does not adequately represent the public interest. Intervention as of right under Rule 24 (a)(2) should therefore be allowed. See *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U. S. 129, 135–136.

Here it is plainly evident that the United States is an eager and willing partner with its allies in New York to foreclose inquiry into barriers to minority voting. What the facts may produce, no one knows. All that is requested is a hearing on the merits. The fresh air of publicity that only a fair and full trial in court can produce should be allowed to ventilate a case that has all the earmarks of a cozy arrangement to suppress the facts—evidence which, if proved, would be adequate as a basis for relief in a case from the South. See *Gaston County* v. *United States,* 395 U. S. 285. This evidence, if proved, should be equally adequate in the North.

MR. JUSTICE BRENNAN, dissenting.

In my view, the District Court erred in denying appellants' motion for leave to intervene in this suit under § 4 (a) of the Voting Rights Act of 1965, as amended, 42

U. S. C. § 1973b (a). The case plainly turns on its facts, and its impact on the development of principles governing intervention will doubtless be small. But what is ultimately at stake in this suit by New York to obtain an exemption under the Voting Rights Act is the applicability of the protections of the Act to 2.2 million minority-group members residing in three New York counties. According to appellants, the total number of minority-group members affected by all previous exemptions combined was less than 100,000.

At the same time that the District Court denied the motion to intervene, it granted the State's motion for summary judgment, thereby exempting these three counties from the coverage of the Act. The United States, defendant in the suit, consented to the entry of summary judgment. As a result, the contention that appellants were prepared to urge—namely, that the grant of an exemption would nullify the specific congressional intent to extend the protections of the Act to the class represented by appellants—was never laid before the Court.

In upholding the denial of leave to intervene, the Court reasons that appellants' motion, filed four days after the United States consented to a grant of summary judgment, was untimely. In the Court's view, appellants should have made their motion during the brief period between the filing of New York's motion for summary judgment and the announcement by the United States that it would not contest that motion. The Court states, with the benefit of hindsight, that it was

> "obvious that there was a strong likelihood that the United States would consent to the entry of judgment since its answer revealed that it was without information with which it could oppose the motion for summary judgment. Thus, it was in-

cumbent upon the appellants, at that stage of the proceedings, to take immediate affirmative steps to protect their interests either by supplying the Department of Justice with any information they possessed concerning the employment of literacy tests in a way designed to deny New York citizens of the right to vote on account of race or color, or by presenting that information to the District Court itself by way of an immediate motion to intervene." *Ante,* at 367.

The timeliness of a motion to intervene is determined, not by reference to the date on which the suit began or the date on which the would-be intervenors learned that it was pending, but rather by reference to the date when the movants learned that intervention was needed to protect their interests. See *Diaz* v. *Southern Drilling Corp.,* 427 F. 2d 1118, 1125 (CA5 1970); cf. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U. S. 129 (1967). Prior to the announcement that the United States would not contest the motion for summary judgment, appellants could not have known that intervention was needed to protect their interests and the interests of the class they represent. In an affidavit filed in connection with the motion to intervene, appellants' attorney stated that he had been advised by three different Justice Department attorneys that the United States would oppose New York's motion for summary judgment. App. 48a–51a. The Court suggests that the contents of the representations made by these attorneys is "a matter of dispute." *Ante,* at 368. The matter was not in dispute, however, at the time the affidavit was filed,* nor did it become the subject of dispute until five months later

*"The United States filed no response to appellants' motion to intervene and did not otherwise object to the motion." Brief for United States 10.

when the Government filed in this Court its Motion to Dismiss or Affirm. Even then, the United States did not deny that appellants had been offered certain assurances by Government attorneys, but stated only that the affidavit was not "an accurate representation of the substance of the conversations between counsel for appellants and attorneys for the government." Motion to Dismiss or Affirm, filed Sept. 13, 1972, p. 4 n. 3.

Thus, the record before the District Court indicated reasonable reliance on the Government's assurances that the suit would not be settled. And appellants did move to intervene within four days of learning that they could no longer rely on the Government to protect their interests. On that record, the District Court was obligated to conclude that the motion was timely filed. Since the allegation of untimeliness was, in my view, the only nonfrivolous objection to the motion, the District Court's denial of the motion was unquestionably erroneous. I dissent.

PITTSBURGH PRESS CO. *v.* PITTSBURGH COMMISSION ON HUMAN RELATIONS ET AL.

CERTIORARI TO THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 72–419. Argued March 20, 1973—Decided June 21, 1973

Following a complaint and hearing, respondent Pittsburgh Commission on Human Relations held that petitioner had violated a city ordinance by using an advertising system in its daily newspaper whereby employment opportunities are published under headings designating job preference by sex. On appeal from affirmance of the Commission's cease-and-desist order, the court below barred petitioner from referring to sex in employment headings, unless the want ads placed beneath them relate to employment opportunities not subject to the ordinance's prohibition against sex discrimination. Petitioner contends that the ordinance contravenes its constitutional rights to freedom of the press. *Held:* The Pittsburgh ordinance as construed to forbid newspapers to carry sex-designated advertising columns for nonexempt job opportunities does not violate petitioner's First Amendment rights. Pp. 381–391.

(a) The advertisements here, which did not implicate the newspaper's freedom of expression or its financial viability, were "purely commercial advertising," which is not protected by the First Amendment. *Valentine* v. *Chrestensen*, 316 U. S. 52, 54. *New York Times Co.* v. *Sullivan*, 376 U. S. 254, distinguished. Pp. 384–387.

(b) Petitioner's argument against maintaining the *Chrestensen* distinction between commercial and other speech is unpersuasive in the context of a case like this, where the regulation of the want ads was incidental to and coextensive with the regulation of employment discrimination. Pp. 387–389.

(c) The Commission's order, which was clear and no broader than necessary, is not a prior restraint endangering arguably protected speech. Pp. 389–390.

4 Pa. Commw. 448, 287 A. 2d 161, affirmed.

POWELL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and REHNQUIST, JJ., joined. BURGER, C. J.,

post, p. 393, and DOUGLAS, J., *post*, p. 397, filed dissenting opinions. STEWART, J., filed a dissenting opinion, in which DOUGLAS, J., joined, *post*, p. 400. BLACKMUN, J., filed a dissenting opinion, *post*, p. 404.

Charles R. Volk argued the cause for petitioner. With him on the briefs was *Ralph T. DeStefano.*

Eugene B. Strassburger III argued the cause and filed a brief for respondents Pittsburgh Commission on Human Relations et al. *Marjorie H. Matson* argued the cause for respondent National Organization of Women, Inc. With her on the brief was *Sylvia Roberts.**

MR. JUSTICE POWELL delivered the opinion of the Court.

The Human Relations Ordinance of the City of Pittsburgh (the Ordinance) has been construed below by

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**Arthur B. Hanson* and *Ralph N. Albright, Jr.*, filed a brief for the American Newspaper Publishers Assn. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Griswold, Assistant Attorney General Pottinger, Deputy Solicitor General Wallace, Harriet S. Shapiro, John C. Hoyle, Julia P. Cooper,* and *Beatrice Rosenberg* for the United States; by *Evelle J. Younger,* Attorney General of California, *Robert H. O'Brien* and *Carl Boronkay,* Assistant Attorneys General, and *Judith T. Ashmann,* Deputy Attorney General, for the California Fair Employment Practice Commission; by *George F. Kugler, Jr.,* Attorney General, *Stephen Skillman,* Assistant Attorney General, and *David S. Litwin,* Deputy Attorney General, for the State of New Jersey; by *Israel Packel,* Attorney General of Pennsylvania, and *Roy Yaffe* and *Michael L. Golden, Jr.,* Assistant Attorneys General, for the Pennsylvania Commission on the Status of Women et al.; by *Norman Dorsen, Ruth Bader Ginsburg,* and *Jeffrey A. Kay* for the American Civil Liberties Union et al.; by *Phineas Indritz, Elizabeth Boyer, Marguerite Rawalt, Martha W. Griffiths, Margaret M. Heckler,* and *Donald M. Fraser* for the American Veterans Committee, Inc., et al.; by *Philip J. Tierney* for the International Association of Official Human Rights Agencies; and by *Rita Page Reuss* and *Jane M. Picker* for the Women's Law Fund, Inc.

the courts of Pennsylvania as forbidding newspapers to carry "help-wanted" advertisements in sex-designated columns except where the employer or advertiser is free to make hiring or employment referral decisions on the basis of sex. We are called upon to decide whether the Ordinance as so construed violates the freedoms of speech and of the press guaranteed by the First and Fourteenth Amendments. This issue is a sensitive one, and a full understanding of the context in which it arises is critical to its resolution.

I

The Ordinance proscribes discrimination in employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex.[1] In relevant part, § 8 of the Ordinance declares it to be unlawful employment practice, "except where based upon a bona fide occupational exemption certified by the Commission":

> "(a) For any employer to refuse to hire any person or otherwise discriminate against any person with respect to hiring . . . because of . . . sex.
>
> . . . . . .
>
> "(e) For any 'employer,' employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to 'employment' or membership which indicates any discrimination because of . . . sex.
>
> . . . . . .
>
> "(j) For any person, whether or not an employer, employment agency or labor organization, to aid . . . in the doing of any act declared to be an unlawful employment practice by this ordinance . . . ."

[1] For the full text of the Ordinance and the 1969 amendment adding sex to the list of proscribed classifications, see App. 410a–436a.

The present proceedings were initiated on October 9, 1969, when the National Organization for Women, Inc. (NOW) filed a complaint with the Pittsburgh Commission on Human Relations (the Commission), which is charged with implementing the Ordinance. The complaint alleged that the Pittsburgh Press Co. (Pittsburgh Press) was violating § 8 (j) of the Ordinance by "allowing employers to place advertisements in the male or female columns, when the jobs advertised obviously do not have bona fide occupational qualifications or exceptions . . . ." Finding probable cause to believe that Pittsburgh Press was violating the Ordinance, the Commission held a hearing, at which it received evidence and heard argument from the parties and from other interested organizations. Among the exhibits introduced at the hearing were clippings from the help-wanted advertisements carried in the January 4, 1970, edition of the Sunday Pittsburgh Press, arranged by column.[2] In many cases, the advertisements consisted simply of the job title, the salary, and the employment agency carrying the listing, while others included somewhat more extensive job descriptions.[3]

On July 23, 1970, the Commission issued a Decision and Order.[4] It found that during 1969 Pittsburgh Press carried a total of 248,000 help-wanted advertisements; that its practice before October 1969 was to use columns captioned "Male Help Wanted," "Female Help Wanted," and "Male-Female Help Wanted"; that it thereafter used the captions "Jobs—Male Interest," "Jobs—Female Interest," and "Male-Female"; and that the advertise-

[2] These exhibits are reproduced in App. 299a–333a.

[3] For examples of these want ads, see the Appendix to this opinion, *infra*, at 392–393.

[4] The full text of the Commission's Decision and Order is set forth in the Appendix to the Petition for Certiorari, at 1a–18a.

ments were placed in the respective columns according to the advertiser's wishes, either volunteered by the advertiser or offered in response to inquiry by Pittsburgh Press.[5] The Commission first concluded that § 8 (e) of the Ordinance forbade employers, employment agencies, and labor organizations to submit advertisements for placement in sex-designated columns. It then held that Pittsburgh Press, in violation of § 8 (j), aided the advertisers by maintaining a sex-designated classification system. After specifically considering and rejecting the argument that the Ordinance violated the First Amendment, the Commission ordered Pittsburgh Press to cease and desist such violations and to utilize a classification system with no reference to sex. This order was affirmed in all relevant respects by the Court of Common Pleas.[6]

On appeal in the Commonwealth Court, the scope of the order was narrowed to allow Pittsburgh Press to carry advertisements in sex-designated columns for jobs exempt from the antidiscrimination provisions of the Ordinance. As pointed out in that court's opinion, the Ordinance does not apply to employers of fewer than five persons, to employers outside the city of Pittsburgh, or to religious, fraternal, charitable, or sectarian organizations, nor does it apply to employment in domestic service or in jobs for which the Commission has certified a bona fide occupational exception. The modified order bars "all reference to sex in employment advertising column

[5] The Commission specifically found that:

"5. The Pittsburgh Press permits the advertiser to select the column within which its advertisement is to be inserted.

"6. When an advertiser does not indicate a column, the Press asks the advertiser whether it wants a male or female for the job and then inserts the advertisement in the jobs—male interest or jobs—female interest column accordingly." *Id.*, at 16a.

[6] See *id.*, at 19a.

headings, except as may be exempt under said Ordinance, or as may be certified as exempt by said Commission." 4 Pa. Commw. 448, 470, 287 A. 2d 161, 172 (1972). The Pennsylvania Supreme Court denied review, and we granted certiorari to decide whether, as Pittsburgh Press contends, the modified order violates the First Amendment by restricting its editorial judgment. 409 U. S. 1036 (1972).[7] We affirm.

II

There is little need to reiterate that the freedoms of speech and of the press rank among our most cherished liberties. As Mr. Justice Black put it: "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our

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[7] Pittsburgh Press also argues that the Ordinance violates due process in that there is no rational connection between sex-designated column headings and sex discrimination in employment. It draws attention to a disclaimer which it runs at the beginning of each of the "Jobs—Male Interest" and "Jobs—Female Interest" columns: "Notice to Job Seekers"

"Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state, and federal, prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

It suffices to dispose of this contention by noting that the Commission's commonsense recognition that the two are connected is supported by evidence in the present record. See App. 236a–239a. See also *Hailes* v. *United Air Lines*, 464 F. 2d 1006, 1009 (CA5 1972). The Guidelines on Discrimination Because of Sex of the Federal Equal Employment Opportunity Commission reflect a similar conclusion. See 29 CFR § 1604.4.

democracy." *New York Times Co.* v. *United States*, 403 U. S. 713, 717 (1971) (concurring opinion). The durability of our system of self-government hinges upon the preservation of these freedoms.

> "[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250 (1936).

The repeated emphasis accorded this theme in the decisions of this Court serves to underline the narrowness of the recognized exceptions to the principle that the press may not be regulated by the Government. Our inquiry must therefore be whether the challenged order falls within any of these exceptions.

At the outset, however, it is important to identify with some care the nature of the alleged abridgment. This is not a case in which the challenged law arguably disables the press by undermining its institutional viability. As the press has evolved from an assortment of small printers into a diverse aggregation including large publishing empires as well, the parallel growth and complexity of the economy have led to extensive regulatory legislation from which "[t]he publisher of a newspaper has no special immunity." *Associated Press* v. *NLRB*, 301 U. S. 103, 132 (1937). Accordingly, this Court has upheld application to the press of the National Labor Relations Act, *ibid.*; the Fair Labor Standards Act, *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178 (1946);

Oklahoma Press Publishing Co. v. *Walling*, 327 U. S. 186 (1946); and the Sherman Antitrust Act, *Associated Press* v. *United States*, 326 U. S. 1 (1945); *Citizen Publishing Co.* v. *United States*, 394 U. S. 131 (1969). See also *Branzburg* v. *Hayes*, 408 U. S. 665 (1972). Yet the Court has recognized on several occasions the special institutional needs of a vigorous press by striking down laws taxing the advertising revenue of newspapers with circulations in excess of 20,000, *Grosjean* v. *American Press Co., supra;* requiring a license for the distribution of printed matter, *Lovell* v. *Griffin*, 303 U. S. 444 (1938); and prohibiting the door-to-door distribution of leaflets, *Martin* v. *Struthers*, 319 U. S. 141 (1943).[8]

But no suggestion is made in this case that the Ordinance was passed with any purpose of muzzling or curbing the press. Nor does Pittsburgh Press argue that the Ordinance threatens its financial viability [9] or impairs in any significant way its ability to publish and distribute its newspaper. In any event, such a contention would not be supported by the record.

III

In a limited way, however, the Ordinance as construed does affect the makeup of the help-wanted section of the newspaper. Under the modified order, Pittsburgh Press will be required to abandon its present policy of providing

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[8] See also *Jones* v. *Opelika*, 319 U. S. 103 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

[9] In response to questioning at oral argument, counsel for Pittsburgh Press stated only:

"Now, I'm not prepared to answer whether the company makes money on [want ads] or not. I suspect it does. They charge for want-ads, and they do make a lot of their revenue in the newspaper through advertising, of course; and I suspect it is profitable." Tr. of Oral Arg. 10.

sex-designated columns and allowing advertisers to select the columns in which their help-wanted advertisements will be placed. In addition, the order does not allow Pittsburgh Press to substitute a policy under which it would make an independent decision regarding placement in sex-designated columns.

Respondents rely principally on the argument that this regulation is permissible because the speech is commercial speech unprotected by the First Amendment. The commercial-speech doctrine is traceable to the brief opinion in *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), sustaining a city ordinance which had been interpreted to ban the distribution by handbill of an advertisement soliciting customers to pay admission to tour a submarine. Mr. Justice Roberts, speaking for a unanimous Court, said:

> "We are . . . clear that the Constitution imposes no such restraint on government as respects purely commercial advertising." *Id.*, at 54.

Subsequent cases have demonstrated, however, that speech is not rendered commercial by the mere fact that it relates to an advertisement. In *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), a city official of Montgomery, Alabama, brought a libel action against four clergymen and the New York Times. The names of the clergymen had appeared in an advertisement, carried in the Times, criticizing police action directed against members of the civil rights movement. In holding that this political advertisement was entitled to the same degree of protection as ordinary speech, the Court stated:

> "That the Times was paid for publishing the advertisement is as immaterial in this connection as

> is the fact that newspapers and books are sold." *Id.*, at 266.

See also *Smith* v. *California*, 361 U. S. 147 (1959); *Ginzburg* v. *United States*, 383 U. S. 463, 474 (1966). If a newspaper's profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be incompatible with the First Amendment.

The critical feature of the advertisement in *Valentine* v. *Chrestensen* was that, in the Court's view, it did no more than propose a commercial transaction, the sale of admission to a submarine. In *New York Times Co.* v. *Sullivan*, MR. JUSTICE BRENNAN, for the Court, found the *Chrestensen* advertisement easily distinguishable:

> "The publication here was not a 'commercial' advertisement in the sense in which the word was used in *Chrestensen*. It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern." 376 U. S., at 266.

In the crucial respects, the advertisements in the present record resemble the *Chrestensen* rather than the *Sullivan* advertisement. None expresses a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor does any of them criticize the Ordinance or the Commission's enforcement practices. Each is no more than a proposal of possible employment. The advertisements are thus classic examples of commercial speech.

But Pittsburgh Press contends that *Chrestensen* is not applicable, as the focus in this case must be upon the exercise of editorial judgment by the newspaper as to where to place the advertisement rather than upon its commercial content. The Commission made a finding of fact that Pittsburgh Press defers in every case to the advertiser's wishes regarding the column in which a want ad should be placed. It is nonetheless true, however, that the newspaper does make a judgment whether or not to allow the advertiser to select the column. We must therefore consider whether this degree of judgmental discretion by the newspaper with respect to a purely commercial advertisement is distinguishable, for the purposes of First Amendment analysis, from the content of the advertisement itself. Or, to put the question differently, is the conduct of the newspaper with respect to the employment want ad entitled to a protection under the First Amendment which the Court held in *Chrestensen* was not available to a commercial advertiser?

Under some circumstances, at least, a newspaper's editorial judgments in connection with an advertisement take on the character of the advertisement and, in those cases, the scope of the newspaper's First Amendment protection may be affected by the content of the advertisement. In the context of a libelous advertisement, for example, this Court has held that the First Amendment does not shield a newspaper from punishment for libel when with actual malice it publishes a falsely defamatory advertisement. *New York Times Co.* v. *Sullivan, supra,* at 279–280. Assuming the requisite state of mind, then, nothing in a newspaper's editorial decision to accept an advertisement changes the character of the falsely defamatory statements. The newspaper may not defend a libel suit on the ground that the falsely defamatory statements are not its own.

Similarly, a commercial advertisement remains commercial in the hands of the media, at least under some circumstances.[10] In *Capital Broadcasting Co.* v. *Acting Attorney General,* 405 U. S. 1000 (1972), aff'g 333 F. Supp. 582 (DC 1971), this Court summarily affirmed a district court decision sustaining the constitutionality of 15 U. S. C. § 1335, which prohibits the electronic media from carrying cigarette advertisements. The District Court there found that the advertising should be treated as commercial speech, even though the First Amendment challenge was mounted by radio broadcasters rather than by advertisers. Because of the peculiar characteristics of the electronic media, *National Broadcasting Co.* v. *United States,* 319 U. S. 190, 226–227 (1943), *Capital Broadcasting* is not dispositive here on the ultimate question of the constitutionality of the Ordinance. Its significance lies, rather, in its recognition that the exercise of this kind of editorial judgment does not necessarily strip commercial advertising of its commercial character.[11]

As for the present case, we are not persuaded that either the decision to accept a commercial advertisement which the advertiser directs to be placed in a sex-designated column or the actual placement there lifts the newspaper's actions from the category of commercial speech. By implication at least, an advertiser whose want ad appears in the "Jobs—Male Interest" column

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[10] In *Head* v. *New Mexico Board,* 374 U. S. 424 (1963), this Court upheld an injunction prohibiting a newspaper and a radio station from carrying optometrists' advertisements which violated New Mexico law. But because the issue had not been raised in the lower courts, this Court did not consider the appellant's First Amendment challenge. *Id.,* at 432 n. 12.

[11] See also *New York State Broadcasters Assn.* v. *United States,* 414 F. 2d 990 (CA2 1969), cert. denied, 396 U. S. 1061 (1970) (refusing to strike down a ban on broadcasts promoting a lottery).

is likely to discriminate against women in his hiring decisions. Nothing in a sex-designated column heading sufficiently dissociates the designation from the want ads placed beneath it to make the placement severable for First Amendment purposes from the want ads themselves. The combination, which conveys essentially the same message as an overtly discriminatory want ad, is in practical effect an integrated commercial statement.

Pittsburgh Press goes on to argue that if this package of advertisement and placement is commercial speech, then commercial speech should be accorded a higher level of protection than *Chrestensen* and its progeny would suggest. Insisting that the exchange of information is as important in the commercial realm as in any other, the newspaper here would have us abrogate the distinction between commercial and other speech.

Whatever the merits of this contention may be in other contexts, it is unpersuasive in this case. Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance.[12] We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes. Nor would the result be different if the nature of the transaction were indicated by placement under columns captioned "Narcotics for Sale" and "Prostitutes Wanted" rather than stated within the four corners of the advertisement.

The illegality in this case may be less overt, but we see no difference in principle here. Sex discrimination in nonexempt employment has been declared illegal under

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[12] See Note, Freedom of Expression in a Commercial Context, 78 Harv. L. Rev. 1191, 1195–1196 (1965). Cf. *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582, 593 n. 42 (D. C. 1971) (Wright, J., dissenting); *Camp-of-the-Pines, Inc.* v. *New York Times Co.*, 184 Misc. 389, 53 N. Y. S. 2d 475 (1945).

§ 8 (a) of the Ordinance, a provision not challenged here. And § 8 (e) of the Ordinance forbids any employer, employment agency, or labor union to publish or cause to be published any advertisement "indicating" sex discrimination. This, too, is unchallenged. Moreover, the Commission specifically concluded that it is an unlawful employment practice for an advertiser to cause an employment advertisement to be published in a sex-designated column.

Section 8 (j) of the Ordinance, the only provision which Pittsburgh Press was found to have violated and the only provision under attack here, makes it unlawful for "any person . . . to aid . . . in the doing of any act declared to be an unlawful employment practice by this ordinance." The Commission and the courts below concluded that the practice of placing want ads for non-exempt employment in sex-designated columns did indeed "aid" employers to indicate illegal sex preferences. The advertisements, as embroidered by their placement, signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions. Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.

IV

It is suggested, in the brief of an *amicus curiae*, that apart from other considerations, the Commission's order should be condemned as a prior restraint on expression.[13] As described by Blackstone, the protection against prior

[13] Brief for *Amicus Curiae* American Newspaper Publishers Association 22 n. 32.

restraint at common law barred only a system of administrative censorship:

> "To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government." 4 W. Blackstone, Commentaries *152.

While the Court boldly stepped beyond this narrow doctrine in *Near* v. *Minnesota,* 283 U. S. 697 (1931), in striking down an injunction against further publication of a newspaper found to be a public nuisance, it has never held that all injunctions are impermissible. See *Lorain Journal Co.* v. *United States,* 342 U. S. 143 (1951). The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment.

The present order does not endanger arguably protected speech. Because the order is based on a continuing course of repetitive conduct, this is not a case in which the Court is asked to speculate as to the effect of publication. Cf. *New York Times Co.* v. *United States,* 403 U. S. 713 (1971). Moreover, the order is clear and sweeps no more broadly than necessary. And because no interim relief was granted, the order will not have gone into effect before our final determination that the actions of Pittsburgh Press were unprotected.[14]

[14] The dissent of THE CHIEF JUSTICE argues that Pittsburgh Press is in danger of being "subject to summary punishment for contempt for having made an 'unlucky' legal guess." *Post,* at 396–397. The Commission is without power to punish summarily for contempt. When it concludes that its order has been violated, "the Commission

V

We emphasize that nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforcement practices of the Commission, or the propriety of sex preferences in employment. Nor, *a fortiori,* does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial. We hold only that the Commission's modified order, narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, does not infringe the First Amendment rights of Pittsburgh Press.

Affirmed.

[For Appendix to opinion of the Court, see *post,* p. 392.]

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shall certify the case and the entire record of its proceedings to the City Solicitor, who shall invoke the aid of an appropriate court to secure enforcement or compliance with the order or to impose [a fine of not more than $300] or both." § 14 of the Ordinance; Appendix to Pet. for Cert. 103a. But, more fundamentally, it was the newspaper's *policy* of allowing employers to place advertisements in sex-designated columns without regard to the exceptions or exemptions contained in the Ordinance, not its treatment of particular want ads, which was challenged in the complaint and was found by the Commission and the courts below to be violative of the Ordinance. Nothing in the modified order or the opinions below prohibits the newspaper from relying in good faith on the representation of an advertiser that a particular job falls within an exception to the Ordinance.

APPENDIX TO OPINION OF THE COURT

Among the advertisements carried in the Sunday Pittsburgh Press on January 4, 1970, was the following one, submitted by an employment agency and placed in the "JOBS—MALE INTEREST" column:

ACAD. INSTRUCTORS	$13,000
ACCOUNTANTS	10,000
ADM. ASS'T, CPA	15,000
ADVERTISING MGR	10,000
BOOKKEEPER F-C	9,000
FINANCIAL CONSULTANT	12,000
MARKETING MANAGER	15,000
MGMT. TRAINEE	8,400
OFFICE MGR. TRAINEE	7,200
LAND DEVELOPMENT	30,000
PRODUCT. MANAGER	18,000
PERSONNEL MANAGER	OPEN
SALES-ADVERTISING	8,400
SALES-CONSUMER	9,600
SALES-INDUSTRIAL	12,000
SALES-MACHINERY	8,400
RETAIL MGR	15,000

Most Positions Fee Paid
EMPLOYMENT SPECIALISTS
2248 Oliver Bldg. 261-2250
Employment Agency

App. 311a.

On the same day, the same agency's advertisement in the "JOBS—FEMALE INTEREST" column was as follows:

ACAD. INSTRUCTORS	$13,000
ACCOUNTANTS	6,000
AUTO-INS. UNDERWRITER	OPEN
BOOKKEEPER-INS	5,000
CLERK-TYPIST	4,200
DRAFTSMAN	6,000
KEYPUNCH D. T.	6,720
KEYPUNCH BEGINNER	4,500
PROOFREADER	4,900
RECEPTIONIST—Mature D. T.	OPEN
EXEC. SEC	6,300
SECRETARY	4,800
SECRETARY, Equal Oppor	6,000
SECRETARY D. T.	5,400
TEACHERS-Pt. Time	day 33.
TYPIST-Statistical	5,000

Most Positions Fee Paid
EMPLOYMENT SPECIALISTS
2248 Oliver Bldg. 261-2250
Employment Agency

Ibid.

[Appendix continued on p. 393.]

Characteristic of those offering fuller job descriptions was the following advertisement, carried in the "JOBS—MALE INTEREST" column:

> STAFF MANAGEMENT TRAINEE
> TO $12,000
> If you have had background in the management of small business then this could be the stepping stone you have been waiting for. You will be your own boss with no cash outlay. Call or write today.

App. 313a.

MR. CHIEF JUSTICE BURGER, dissenting.

Despite the Court's efforts to decide only the narrow question presented in this case, the holding represents, for me, a disturbing enlargement of the "commercial speech" doctrine, *Valentine* v. *Chrestensen,* 316 U. S. 52 (1942), and a serious encroachment on the freedom of press guaranteed by the First Amendment. It also launches the courts on what I perceive to be a treacherous path of defining what layout and organizational decisions of newspapers are "sufficiently associated" with the "commercial" parts of the papers as to be constitutionally unprotected and therefore subject to governmental regulation. Assuming, *arguendo,* that the First Amendment permits the States to place restrictions on the content of commercial advertisements, I would not enlarge that power to reach the layout and organizational decisions of a newspaper.

Pittsburgh Press claims to have decided to use sex-designated column headings in the classified advertising section of its newspapers to facilitate the use of classified ads by its readers. Not only is this purpose conveyed to the readers in plain terms, but the newspaper also explicitly cautions readers against interpreting the column headings as indicative of sex discrimination. Thus,

before each column heading the newspaper prints the following "Notice to Job Seekers":

> "Jobs are arranged under Male and Female classifications for the convenience of our readers. This is done because most jobs generally appeal more to persons of one sex than the other. Various laws and ordinances—local, state and federal, prohibit discrimination in employment because of sex unless sex is a bona fide occupational requirement. Unless the advertisement itself specifies one sex or the other, job seekers should assume that the advertiser will consider applicants of either sex in compliance with the laws against discrimination."

To my way of thinking, Pittsburgh Press has clearly acted within its protected journalistic discretion in adopting this arrangement of its classified advertisements. Especially in light of the newspaper's "Notice to Job Seekers," it is unrealistic for the Court to say, as it does, that the sex-designated column headings are not "sufficiently dissociate[d]" from the "want ads placed beneath [them] to make the placement severable for First Amendment purposes from the want ads themselves."[1] *Ante*, at 388. In any event, I believe the First Amendment

[1] The Court and the opinions under review place great stress on the finding of the Pittsburgh Commission on Human Relations that the Pittsburgh Press "permits the advertiser to select the column within which its advertisement is to be inserted." That finding, however, does not disprove Pittsburgh Press' claim that it uses column headings for the convenience of its readers. In any event, the order under review, as the Court acknowledges, "does not allow Pittsburgh Press to substitute a policy under which it would make an independent decision regarding placement in sex-designated columns." *Ante*, at 384. Thus, even if the newspaper became actively involved in selecting the appropriate column for each advertisement, presumably the Commission's order would still prohibit Pittsburgh Press from using the column headings.

freedom of press includes the right of a newspaper to arrange the content of its paper, whether it be news items, editorials, or advertising, as it sees fit.[2] In the final analysis, the readers are the ultimate "controllers" no matter what excesses are indulged in by even a flamboyant or venal press; that it often takes a long time for these influences to bear fruit is inherent in our system.

The Court's conclusion that the Commission's cease-and-desist order does not constitute a prior restraint gives me little reassurance. That conclusion is assertedly based on the view that the order affects only a "continuing course of repetitive conduct." *Ante*, at 390. Even if that were correct, I would still disagree since the Commission's order appears to be in effect an outstanding *injunction* against certain publications—the essence of a prior restraint. In any event, my understanding of the effects of the Commission's order differs from that of the Court. As noted in the Court's opinion, the Commonwealth Court narrowed the injunction to permit Pittsburgh Press to use sex-designated column headings for want ads dealing with jobs exempt under the Ordinance. The Ordinance does not apply, for example,

> "to employers of fewer than five persons, to employers outside the city of Pittsburgh, or to religious, fraternal, charitable or sectarian organizations, nor does it apply to employment in domestic service or in jobs for which the Commission has certified a bona fide occupational exception." *Ante*, at 380.

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[2] There would be time enough to consider whether this principle would apply to the situation hypothesized by the Court, for example, where a newspaper gives "notice" of narcotics transactions by placing certain advertisements under a "Narcotics for Sale" caption. For now, I need only state that the two situations strike me as being entirely different. We do not have here, in short, such a blatant involvement by a newspaper in a criminal transaction.

If Pittsburgh Press chooses to continue using its column headings for advertisements submitted for publication by exempted employers, it may well face difficult legal questions in deciding whether a particular employer is or is not subject to the Ordinance. If it makes the wrong decision and includes a covered advertisement under a sex-designated column heading, it runs the risk of being held in summary contempt for violating the terms of the order.[3]

In practical effect, therefore, the Commission's order in this area may have the same inhibiting effect as the injunction in *Near* v. *Minnesota*, 283 U. S. 697 (1931), which permanently enjoined the publishers of a newspaper from printing a "malicious, scandalous or defamatory newspaper, as defined by law." *Id.*, at 706. We struck down the injunction in *Near* as a prior restraint. In 1971, we reaffirmed the principle of presumptive unconstitutionality of prior restraint in *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971). Indeed, in *New York Times Co.* v. *United States*, 403 U. S. 713 (1971), every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraint as presumptively unconstitutional. In this case, the respondents have, in my view, failed to carry their burden. I would therefore hold the Commission's order to be impermissible prior restraint. At the very least, we ought to make clear that a newspaper may not be subject to summary punishment for contempt for having made an

[3] The Court's statement that the "Commission is without power to punish summarily for contempt," *ante*, at 390 n. 14, is hardly reassuring to me in a First Amendment setting. We are still left with no assurance that an enforcement action initiated at the request of the Commission will not be summary in nature. It is helpful that the Court expresses a caveat on this score. However, the weighty presumption of unconstitutionality of prior restraint of the press seems to be given less regard than we have traditionally accorded it.

"unlucky" legal guess on a particular advertisement or for having failed to secure advance Commission approval of a decision to run an advertisement under a sex-designated column.

MR. JUSTICE DOUGLAS, dissenting.

While I join the dissent of MR. JUSTICE STEWART, I add a few words. As he says, the press, like any other business, can be regulated on business and economic matters. Our leading case on that score is *Associated Press* v. *United States*, 326 U. S. 1, which holds that a news-gathering agency may be made accountable for violations of the antitrust laws. By like token, a newspaper, periodical, or TV or radio broadcaster may be subjected to labor relations laws. And that regulation could constitutionally extend to the imposition of penalties or other sanctions if any unit of the press violated laws that barred discrimination in employment based on race or religion or sex.

Pennsylvania has a regulatory regime designed to eliminate discrimination in employment based on sex; and the commission in charge of that program issues cease-and-desist orders against violators. There is no doubt that Pittsburgh Press would have no constitutional defense against such a cease-and-desist order issued against it for discriminatory employment practices.

But I believe that Pittsburgh Press by reason of the First Amendment may publish what it pleases about any law without censorship or restraint by Government. The First Amendment does not require the press to reflect any ideological or political creed reflecting the dominant philosophy, whether transient or fixed. It may use its pages and facilities to denounce a law and urge its repeal or, at the other extreme, denounce those who do not respect its letter and spirit.

Commercial matter, as distinguished from news, was

held in *Valentine* v. *Chrestensen*, 316 U. S. 52, not to be subject to First Amendment protection. My views on that issue have changed since 1942, the year *Valentine* was decided. As I have stated on earlier occasions, I believe that commercial materials also have First Amendment protection. If Empire Industries Ltd., doing business in Pennsylvania, wanted to run full-page advertisements denouncing or criticizing this Pennsylvania law, I see no way in which Pittsburgh Press could be censored or punished for running the ad, any more than a person could be punished for uttering the contents of the ad in a public address in Independence Hall. The *pros* and *cons* of legislative enactments are clearly discussion or dialogue that is highly honored in our First Amendment traditions.

The want ads which gave rise to the present litigation express the preference of one employer for the kind of help he needs. If he carried through to hiring and firing employees on the basis of those preferences, the state commission might issue a remedial order against him, if discrimination in employment was shown. Yet he could denounce that action with impunity and Pittsburgh Press could publish his denunciation or write an editorial taking his side also with impunity.

Where there is a valid law, the Government can enforce it. But there can be no valid law censoring the press or punishing it for publishing its views or the views of subscribers or customers who express their ideas in letters to the editor or in want ads or other commercial space. There comes a time, of course, when speech and action are so closely brigaded that they are really one. Falsely shouting "fire" in a theater, the example given by Mr. Justice Holmes, *Schenck* v. *United States*, 249 U. S. 47, 52, is one example. *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, written by Mr. Justice Black, is another. There are here, however, no such unusual circumstances.

As MR. JUSTICE STEWART says, we have witnessed a growing tendency to cut down the literal requirements of First Amendment freedoms so that those in power can squelch someone out of step. Historically, the miscreant has usually been an unpopular minority. Today it is a newspaper that does not bow to the spreading bureaucracy that promises to engulf us. It may be that we have become so stereotyped as to have earned that fate. But the First Amendment presupposes free-wheeling, independent people whose vagaries include ideas spread across the entire spectrum of thoughts and beliefs.* I would let any expression in that broad spectrum flourish, unrestrained by Government, unless it was an integral part of action—the only point which in the Jeffersonian philosophy marks the permissible point of governmental intrusion.

I therefore dissent from affirmance of this judgment.

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*As Alexander Meiklejohn has stated: "The First Amendment was not written primarily for the protection of those intellectual aristocrats who pursue knowledge solely for the fun of the game, whose search for truth expresses nothing more than a private intellectual curiosity or an equally private delight and pride in mental achievement. It was written to clear the way for thinking which serves the general welfare. It offers defense to men who plan and advocate and incite toward corporate action for the common good. On behalf of such men it tells us that every plan of action must have a hearing, every relevant idea of fact or value must have full consideration, whatever may be the dangers which that activity involves. It makes no difference whether a man is advocating conscription or opposing it, speaking in favor of a war or against it, defending democracy or attacking it, planning a communist reconstruction of our economy or criticising it. So long as his active words are those of participation in public discussion and public decision of matters of public policy, the freedom of those words may not be abridged. That freedom is the basic postulate of a society which is governed by the votes of its citizens." Free Speech and Its Relation to Self-Government 45–46 (1948).

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, dissenting.

I have no doubt that it is within the police power of the city of Pittsburgh to prohibit discrimination in private employment on the basis of race, color, religion, ancestry, national origin, place of birth, or sex. I do not doubt, either, that in enforcing such a policy the city may prohibit employers from indicating any such discrimination when they make known the availability of employment opportunities. But neither of those propositions resolves the question before us in this case.

That question, to put it simply, is whether any government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot. Under the First and Fourteenth Amendments I think no government agency in this Nation has any such power.[1]

It is true, of course, as the Court points out, that the publisher of a newspaper is amenable to civil and criminal laws of general applicability. For example, a newspaper publisher is subject to nondiscriminatory general taxation,[2] and to restrictions imposed by the National Labor Relations Act,[3] the Fair Labor Standards Act,[4] and the Sherman Act.[5] In short, as businessman or em-

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[1] I put to one side the question of governmental power to prevent publication of information that would clearly imperil the military defense of our Nation, *e. g.*, "the publication of the sailing dates of transports or the number and location of troops." *Near* v. *Minnesota*, 283 U. S. 697, 716.

[2] See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 112.

[3] See *Associated Press* v. *NLRB*, 301 U. S. 103, 132–133.

[4] See *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186, 192–193; *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178.

[5] See *Associated Press* v. *United States*, 326 U. S. 1; *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 155–157; *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139.

ployer, a newspaper publisher is not exempt from laws affecting businessmen and employers generally. Accordingly, I assume that the Pittsburgh Press Co., as an employer, can be and is completely within the coverage of the Human Relations Ordinance of the city of Pittsburgh.

But what the Court approves today is wholly different. It approves a government order dictating to a publisher in advance how he must arrange the layout of pages in his newspaper.

Nothing in *Valentine* v. *Chrestensen*, 316 U. S. 52, remotely supports the Court's decision. That case involved the validity of a local sanitary ordinance that prohibited the distribution in the streets of "commercial and business advertising matter." The Court held that the ordinance could be applied to the owner of a commercial tourist attraction who wanted to drum up trade by passing out handbills in the streets. The Court said it was "clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment." *Id.*, at 54. Whatever validity the *Chrestensen* case may still retain when limited to its own facts,[6] it certainly does not stand for the proposition that the advertising pages of a newspaper are outside the protection given the newspaper by the First and Fourteenth Amendments. Any possible doubt on that score was surely laid to rest in *New York Times Co.* v. *Sullivan*, 376 U. S. 254.[7]

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[6] MR. JUSTICE DOUGLAS has said that "[t]he [*Chrestensen*] ruling was casual, almost offhand. And it has not survived reflection." *Cammarano* v. *United States*, 358 U. S. 498, 514 (concurring opinion).

[7] The Court acknowledges, as it must, that what it approves today

So far as I know, this is the first case in this or any other American court that permits a government agency to enter a composing room of a newspaper and dictate to the publisher the layout and makeup of the newspaper's pages. This is the first such case, but I fear it may not be the last. The camel's nose is in the tent. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way. . . ." *Boyd* v. *United States*, 116 U. S. 616, 635.

So long as Members of this Court view the First Amendment as no more than a set of "values" to be balanced against other "values," that Amendment will remain in grave jeopardy. See *Paris Adult Theatre I* v. *Slaton*, *ante*, p. 49 (First and Fourteenth Amendment protections outweighed by public interest in "quality of life," "total community environment," "tone of commerce," "public safety"); *Branzburg* v. *Hayes*, 408 U. S. 665 (First Amendment claim asserted by newsman to maintain confidential relationship with his sources outweighed by obligation to give information to grand jury); *New York Times Co.* v. *United States*, 403 U. S. 713, 748 (BURGER, C. J., dissenting) (First Amendment outweighed by judicial problems caused by "unseemly haste"); *Columbia*

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is not a restriction on a purely commercial advertisement but on the editorial judgment of the newspaper, for "the newspaper does make a judgment whether or not to allow the advertiser to select the column." *Ante*, at 386. The effect of the local ordinance and the court order is to affect the makeup of the help-wanted section of the newspaper, and to preclude Pittsburgh Press from placing advertisements in sex-designated columns. The Court justifies this restriction on the newspaper's editorial judgment by arguing that it had taken on the "character of the advertisement" so that the combination conveyed "an integrated commercial statement." But the stark fact remains that the restriction here was placed on the editorial judgment of the newspaper, not the advertisement.

Broadcasting System, Inc. v. *Democratic National Committee,* 412 U. S. 94, 199 (BRENNAN, J., dissenting) (balancing of "the competing First Amendment interests").

It is said that the goal of the Pittsburgh ordinance is a laudable one, and so indeed it is. But, in the words of Mr. Justice Brandeis, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead* v. *United States,* 277 U. S. 438, 479 (dissenting opinion). And, as Mr. Justice Black once pointed out, "The motives behind the state law may have been to do good. But . . . [h]istory indicates that urges to do good have led to the burning of books and even to the burning of 'witches.'" *Beauharnais* v. *Illinois,* 343 U. S. 250, 274 (dissenting opinion).

The Court today holds that a government agency can force a newspaper publisher to print his classified advertising pages in a certain way in order to carry out governmental policy. After this decision, I see no reason why government cannot force a newspaper publisher to conform in the same way in order to achieve other goals thought socially desirable. And if government can dictate the layout of a newspaper's classified advertising pages today, what is there to prevent it from dictating the layout of the news pages tomorrow?

Those who think the First Amendment can and should be subordinated to other socially desirable interests will hail today's decision. But I find it frightening. For I believe the constitutional guarantee of a free press is more than precatory. I believe it is a clear command

that government must never be allowed to lay its heavy editorial hand on any newspaper in this country.

MR. JUSTICE BLACKMUN, dissenting.

I dissent substantially for the reasons stated by MR. JUSTICE STEWART in his opinion. But I do not subscribe to the statements contained in that paragraph of his opinion which begins on p. 402 and ends on p. 403.

Syllabus

NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES ET AL. *v.* DUBLINO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

No. 72–792. Argued April 17–18, 1973—Decided June 21, 1973*

The 1967 amendments to the Social Security Act included the Federal Work Incentive Program (WIN), designed to help individuals on welfare become wage-earning members of society. The States were required to incorporate this program into their Aid to Families With Dependent Children (AFDC) program, to provide that certain "employable" individuals, as a condition for receiving aid, shall register for manpower services, training, and employment. In 1971 New York enacted provisions of its Social Welfare Law, commonly referred to as the New York Work Rules, which similarly required cooperation by employable individuals to continue to receive assistance. Appellees, New York public assistance recipients subject to the Work Rules, challenge those Rules as having been pre-empted by the WIN provisions of the Social Security Act. The three-judge District Court ruled that "for those in the AFDC program, WIN pre-empts the New York Work Rules." *Held:*

1. The WIN provisions of the Social Security Act do not pre-empt the New York Work Rules of the New York Social Welfare Law. Pp. 412–423.

(a) There is no substantial evidence that Congress intended, either expressly or impliedly, to pre-empt state work programs. More is required than the apparent comprehensiveness of the WIN legislation to show the "clear manifestation of [congressional] intention" that must exist before a federal statute is held "to supersede the exercise" of state action. *Schwartz* v. *Texas*, 344 U. S. 199, 202–203. Pp. 412–417.

(b) Affirmative evidence exists to establish Congress' intention not to terminate all state work programs and foreclose future state cooperative programs: WIN is limited in scope and appli-

*Together with No. 72–802, *Onondaga County Department of Social Services et al.* v. *Dublino et al.*, also on appeal from the same court.

cation; it is a partial program, with state supplementation, as illustrated by New York; and the Department of Health, Education, and Welfare, responsible for administering the Social Security Act, has never considered WIN as pre-emptive. Pp. 417–421.

(c) Where coordinate state and federal efforts exist within a complementary administrative framework in the pursuit of common purposes, as here, the case for federal pre-emption is not persuasive. Pp. 421–422.

2. The question of whether some particular sections of the Work Rules might contravene the specific provisions of the Social Security Act is not resolved, but is remanded to the District Court for consideration. Pp. 422–423.

348 F. Supp. 290, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 423.

Jean M. Coon, Assistant Solicitor General of New York, argued the cause for appellants in both cases. With her on the briefs in No. 72–792 were *Louis J. Lefkowitz*, Attorney General, and *Ruth Kessler Toch*, Solicitor General. *Philip C. Pinsky* filed a brief for appellants in No. 72–802.

Dennis R. Yeager argued the cause and filed briefs for appellees in both cases.†

MR. JUSTICE POWELL delivered the opinion of the Court.

The question before us is whether the Social Security Act of 1935, 49 Stat. 620, as amended, bars a State from

†Briefs of *amici curiae* urging reversal in both cases were filed by *Solicitor General Griswold, Wilmot R. Hastings*, and *St. John Barrett* for the United States, and by *Evelle J. Younger*, Attorney General, *Elizabeth Palmer*, Assistant Attorney General, and *John J. Klee, Jr.*, Deputy Attorney General, for the State of California.

Steven J. Cole and *Henry A. Freedman* filed a brief for the National Welfare Rights Organization et al. as *amici curiae* urging affirmance in both cases.

independently requiring individuals to accept employment as a condition for receipt of federally funded aid to families with dependent children. More precisely, the issue is whether that part of the Social Security Act known as the Federal Work Incentive Program (WIN) preempts the provisions of the New York Social Welfare Law commonly referred to as the New York Work Rules. A brief description of both the state and federal programs will be necessary.

The Work Rules were enacted by New York in 1971 [1]

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[1] The basic provisions of the Work Rules at the time this action was brought are set forth in § 131 of the New York Social Services Law (Supp. 1971–1972):

"4. No assistance or care shall be given to an employable person who has not registered with the nearest local employment agency of the department of labor or has refused to accept employment in which he is able to engage.

"A person shall be deemed to have refused to accept such employment if he:

"a. fails to obtain and file with the social services district at least semi-monthly a new certificate from the appropriate local employment office of the state department of labor stating that such employment office has no order for an opening in part-time, full-time, temporary or permanent employment in which the applicant is able to engage, or

"b. willfully fails to report for an interview at an employment office with respect to employment when requested to do so by such office, or

"c. willfully fails to report to such office the result of a referral to employment, or

"d. willfully fails to report for employment. Such willful failures or refusals as above listed shall be reported immediately to the social services district by such employment office.

"For the purposes of this subdivision and subdivision five, a person shall be deemed employable if such person is not rendered unable to work by: illness or significant and substantial incapacitation, either mental or physical, to the extent and of such duration that such illness or incapacitation prevents such person from performing services; advanced age; full-time attendance at school in the case of minor, in accordance with provisions of this chapter; full-time, satisfactory participation in an approved program of voca-

as part of Governor Rockefeller's efforts to reorganize the New York Welfare Program. Their aim, as explained by the Governor, is to encourage "the young and able-bodied, temporarily in need of assistance through no fault of their own, to achieve the education and the skills, the motivation and the determination that will make it possible for them to become increasingly self-sufficient, independent citizens who can contribute to and share in the responsibility for their families and our society." [2]

To achieve this, the Work Rules establish a presumption that certain recipients of public assistance are employable [3] and require those recipients to report every two weeks to pick up their assistance checks in person; to file every two weeks a certificate from the appropriate public employment office stating that no suitable employment opportunities are available; to report for

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tional training or rehabilitation; the need of such person to provide full-time care for other members of such person's household who are wholly incapacitated, or who are children, and for whom required care is not otherwise reasonably available, notwithstanding diligent efforts by such person and the appropriate social services department to obtain others to provide such care. A person assigned to and participating in a public works project under the provisions of section one hundred sixty-four or three hundred fifty-k of this chapter shall be deemed to be employable but not employed.

"Every employable recipient of public assistance or person who is deemed not to be employable by reason of full-time satisfactory participation in an approved program of vocational training or rehabilitation shall receive his public assistance grants and allowances in person from the division of employment of the state department of labor, in accordance with regulations of the department."

Section 350-k of New York Social Services Law provides for public works project employment for employable recipients of AFDC who cannot be placed in regular employment.

[2] Special Message to the New York State Legislature, Mar. 29, 1971 (Brief for Appellant N. Y. State Depts. 9).

[3] For the statutory definition of persons deemed "employable" see n. 1, *supra*.

requested employment interviews; to report to the public employment office the result of a referral for employment; and not to fail willfully to report for suitable employment, when available. In addition to establishing a system of referral for employment in the private sector of the economy, the Work Rules permit the establishment of public works projects in New York's social service districts.[4] Failure of "employable" persons to participate in the operation of the Work Rules results in a loss of assistance.[5]

Like the Work Rules, WIN is designed to help individuals on welfare "acquire a sense of dignity, self-worth, and confidence which will flow from being recognized as a wage-earning member of society . . . ," 42 U. S. C. § 630 (1970 ed., Supp. I). The program was enacted as part of the 1967 amendments to the Social Security Act,[6] whereby States were required to incorporate WIN into their Aid to Families With Dependent Children (AFDC)

[4] See *ibid.* These provisions for employment of recipients in public works projects have not been implemented, as the HEW Regional Commissioner indicated that such projects would not be approved for federal aid. Brief for Appellant N. Y. State Depts. 13.

[5] See n. 1, *supra*, and Social Services Administrative Letter, 71 PWD–43 which reads in relevant part:

"[T]he Laws of 1971 place a renewed and expanded emphasis on restoring all employable recipients of public assistance to employment in the regular economy. Accordingly, all unemployed employable persons applying for or receiving public assistance are not only required to register at the New York State Employment Service district office in their community, and report there regularly for appropriate employment counseling services and job referral, but, effective July 1, they will also pick up their assistance checks there. The penalty for not cooperating in this procedure is ineligibility for public assistance whether the individual is the grantee head of family, single person living alone, or non-grantee non-head of family." App. 53–54.

[6] In 1971, further amendments dealing with WIN were enacted. Act of Dec. 28, 1971, Pub. L. 92–223, § 3, 85 Stat. 803.

plans. 42 U. S. C. §§ 602 (a)(19), 630 *et seq.* (1970 ed. and Supp. I). Every state AFDC plan must provide that certain "employable" individuals, as a condition for receiving aid, shall register for manpower services, training, and employment under regulations promulgated by the Secretary of Labor. 42 U. S. C. § 602 (a)(19)(A) (1970 ed., Supp. I).[7] Available services, to be provided by the State, must include "such health, vocational rehabilitation, counseling, child care, and other social and supportive services as are necessary to enable such individuals to accept employment or receive manpower training . . . ." 42 U. S. C. § 602 (a)(19)(G) (1970 ed.,

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[7] "§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary.

"(a) A State plan for aid and services to needy families with children must . . .

. . . . . .

"(19) provide—

"(A) that every individual, as a condition of eligibility for aid under this part, shall register for manpower services, training, and employment as provided by regulations of the Secretary of Labor, unless such individual is—

"(i) a child who is under age 16 or attending school full time;

"(ii) a person who is ill, incapacitated, or of advanced age;

"(iii) a person so remote from a work incentive project that his effective participation is precluded;

"(iv) a person whose presence in the home is required because of illness or incapacity of another member of the household;

"(v) a mother or other relative of a child under the age of six who is caring for the child; or

"(vi) the mother or other female caretaker of a child, if the father or another adult male relative is in the home and not excluded by clause (i), (ii), (iii), or (iv) of this subparagraph (unless he has failed to register as required by this subparagraph, or has been found by the Secretary of Labor under section 633 (g) of this title to have refused without good cause to participate under a work incentive program or accept employment as described in subparagraph (F) of this paragraph)."

Supp. I). After the required services have been provided, the State must certify to the Secretary of Labor those individuals who are ready for employment or training programs, 42 U. S. C. §§ 602 (a)(19)(G), 632, 633 (1970 ed. and Supp. I).[8] Employment consists both of work in the regular economy and participation in public service programs. 42 U. S. C. §§ 630, 632, 633 (1970 ed. and Supp. I). As with the Work Rules, cooperation in WIN is necessary for employable individuals to continue to receive assistance.

In the court below, appellees, New York public assistance recipients subject to the Work Rules, challenged those Rules as violative of several provisions of the Constitution and as having been pre-empted by the WIN provisions of the Federal Social Security Act. The three-judge District Court rejected all but the last contention. 348 F. Supp. 290 (WDNY 1972). On this point, it held that "for those in the AFDC program, WIN pre-empts" [9] the New York Work Rules. *Id.*, at 297.[10] As

[8] States are penalized by a reduction in assistance if they fail to certify to the Secretary of Labor at least 15% of the average number of those registered each year. 42 U. S. C. § 603 (c) (1970 ed., Supp. I).

[9] The District Court and the parties in this case have used the word "pre-emption" in a rather special sense. This litigation does not involve arguable federal pre-emption of a wholly independent state program dealing with the same or a similar problem. Cf., *e. g.*, *Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 440, 446 (1960). AFDC is a federal statutory program, of which the WIN program is a part. The State Work Rules also were promulgated as part of the implementation of AFDC, and are therefore not wholly independent of the federal program. With this caveat, however, we will preserve the District Court's usage, which has the advantage of focusing attention on the critical question: whether Congress intended WIN to provide the exclusive mechanism for establishing work rules under AFDC.

[10] The court found additional points of conflict between the state and federal programs with regard to procedures for termination of

this holding not only affected the continued operation of the New York Rules but raised serious doubts as to the viability of the supplementary work programs in 22 States, we set the cause for argument, 409 U. S. 1123 (1973).[11] We now reverse this holding.

I

The holding of the court below affects the Work Rules only insofar as they apply to AFDC recipients. 348 F. Supp., at 297, 300 and n. 5. New York's Home Relief program, for example—a general state assistance plan for which there is no federal reimbursement or support[12]—remains untouched by the court's pre-emption ruling. As to AFDC participants, however, the decision below would render the Work Rules inoperative and hold WIN "the exclusive manner of applying the carrot and stick" in efforts to place such recipients in gainful employment. *Id.*, at 300.[13]

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benefits and the presence of certain hearings and counseling services under WIN which were absent from the Work Rules. 348 F. Supp. 290, 295–297.

[11] We postponed consideration of the question of jurisdiction to the hearing on the merits. We now conclude that the constitutional questions raised by appellees were not so insubstantial as to deprive the three-judge District Court of jurisdiction.

As to appellees' due process claim, the court below directed the State to implement suitable means of informing Home Relief recipients of their hearing rights. *Id.*, at 299. The State stipulates that this has been done. Tr. of Oral Arg. 19–20. The only issue which we address on this appeal is whether the state program is superseded in whole or in part by federal law.

[12] The AFDC program is jointly financed by the States and the Federal Government. *Dandridge* v. *Williams*, 397 U. S. 471, 473 (1970).

[13] Appellees' position is also one of "complete exclusion" of the Work Rules, at least with regard to AFDC recipients. Tr. of Oral Arg. 34; Brief for Appellees in Response to Brief for the United States as *Amicus Curiae* 2–3.

This is a sweeping step that strikes at the core of state prerogative under the AFDC program—a program which this Court has been careful to describe as a "scheme of cooperative federalism." *King* v. *Smith,* 392 U. S. 309, 316 (1968); *Dandridge* v. *Williams,* 397 U. S. 471, 478 (1970); *Jefferson* v. *Hackney,* 406 U. S. 535, 542 (1972). It could impair the capacity of the state government to deal effectively with the critical problem of mounting welfare costs and the increasing financial dependency of many of its citizens. New York has a legitimate interest in encouraging those of its citizens who can work to do so, and thus contribute to the societal well-being in addition to their personal and family support. To the extent that the Work Rules embody New York's attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardships enveloping many state and local governments, this Court should not lightly interfere. The problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution.

This Court has repeatedly refused to void state statutory programs, absent congressional intent to pre-empt them.

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed." *Schwartz* v. *Texas,* 344 U. S. 199, 202–203 (1952).

See also *Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U. S. 423, 429 (1966); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U. S. 440, 446 (1960); *Mintz* v. *Baldwin*, 289 U. S. 346, 350 (1933); *Savage* v. *Jones*, 225 U. S. 501, 533 (1912).

This same principle relates directly to state AFDC programs, where the Court already has acknowledged that States "have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *King* v. *Smith*, *supra*, at 318–319; *Dandridge* v. *Williams*, *supra*, at 478; *Jefferson* v. *Hackney*, *supra*, at 541. Moreover, at the time of the passage of WIN in 1967, 21 States already had initiated welfare work requirements as a condition of AFDC eligibility.[14] If Congress had intended to pre-empt state plans and efforts in such an important dimension of the AFDC program as employment referrals for those on assistance, such intentions would in all likelihood have been expressed in direct and unambiguous language. No such expression exists, however, either in the federal statute or in the committee reports.[15]

Appellees argue, nonetheless, that Congress intended to pre-empt state work programs because of the comprehensive nature of the WIN legislation, its legislative his-

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[14] See Brief for the United States as *Amicus Curiae* 12. The information was derived from a survey of state plans conducted by the Department of Health, Education, and Welfare.

[15] No express intention to eliminate co-existing state work programs appears either at the time of the original 1967 enactment of WIN, see S. Rep. No. 744, 90th Cong., 1st Sess., 26, 145–157; H. R. Rep. No. 1030, 90th Cong., 1st Sess., 58–59, or at the time of the 1971 amendments, n. 6, *supra*.

tory,[16] and the alleged conflicts between certain sections of the state and federal laws.[17] We do not agree. We reject, to begin with, the contention that pre-emption is to be inferred merely from the comprehensive character of the federal work incentive provisions, 42 U. S. C. §§ 602 (a)(19), 630 *et seq.* (1970 ed. and Supp. I). The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem, cf. *Askew* v. *American Waterways,* 411 U. S. 325 (1973). Given the complexity of the matter addressed by Congress in WIN, a detailed statutory scheme was both likely and appropriate, completely apart from any questions of pre-emptive intent. This would be especially the case when the federal work incentive provisions had to be sufficiently comprehensive to authorize and govern programs in States which had no welfare work requirements of their own as well as cooperatively in States with such requirements.

Appellees also rely, as did the District Court, on the legislative history as supporting the view that "the WIN legislation is addressed to all AFDC recipients, leaving no employable recipients to be subject to state work rules." Brief for Appellees 29. The court below pointed to no specific legislative history as supportive of its conclusion. Appellees do cite fragmentary statements

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[16] The court below asserted that the legislative history was supportive of a pre-emptive intent, 348 F. Supp., at 297.

[17] In view of our remand, Part III, *infra,* we do not reach the issue of specific alleged conflicts. In sum, however, they are not sufficient to indicate pre-emptive intent, especially in light of the impressive evidence to the contrary.

which we find unpersuasive. Reliance is placed, for example, on a statement in the Report of the House Ways and Means Committee on the WIN legislation as follows:

> "Under your committee's bill, States would be required to develop a program *for each appropriate* relative and dependent child which would assure, to the maximum extent possible, that each individual would enter the labor force *in order to become self-sufficient.* To accomplish this, the States would have to assure that *each* adult in the family and each child over age 16 who is not attending school is given, when appropriate, employment counseling, testing, and job training." H. R. Rep. No. 544, 90th Cong., 1st Sess., 16 (1967).[18] (Emphasis supplied.)

At best, this statement is ambiguous as to a possible congressional intention to supersede all state work programs.[19] "Appropriateness," as used in the Committee

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[18] Other citations to similar effect appear in Brief for Appellees 29–30.

[19] Perhaps the most revealing legislative expressions confirm, subsequent to enactment, a congressional desire to preserve supplementary state work programs, not to supersede them. In the wake of the invalidation of the New York Work Rules by the three-judge District Court, members of the New York congressional delegation became concerned that the court had misconstrued the intent of Congress. The following colloquy occurred between Senator Buckley of New York and Senator Long of Louisiana, Chairman of the Finance Committee which considered WIN prior to approval by the Senate:

"Mr. Buckley. Was it ever the intention of Congress at that time to have the provisions of the WIN statutes preempt the field of employment and training for ADC recipients?

"Mr. Long. I did not have that in mind. . . .

"Mr. Buckley. . . . So far as the distinguished chairman is con-

Report, may well mean "appropriateness" solely within the scope and confines of WIN. Furthermore, the language employed by Congress in enacting WIN must be considered in conjunction with its operational scope and level of funding, which, as will be shown, is quite limited with respect to the total number of employable AFDC recipients, Part II, *infra*.

In sum, our attention has been directed to no relevant argument which supports, except in the most peripheral way, the view that Congress intended, either expressly or impliedly, to pre-empt state work programs. Far more would be required to show the "clear manifestation of [congressional] intention" which must exist before a federal statute is held "to supersede the exercise" of state action. *Schwartz* v. *Texas*, 344 U. S., at 202–203.

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cerned, was it ever the intention of at least this body to have a preemption in this field?

"Mr. Long. It was never our intention to prevent a State from requiring recipients to do something for their money if they were employable. . . ." 118 Cong. Rec. 36819 (1972).

In the House of Representatives, a similar dialogue took place between Congressman Carey of New York and Congressman Mills, Chairman of the House Ways and Means Committee, which considered the WIN program:

"Mr. Carey of New York. . . . My specific question for the chairman has to do with the intent of the Congress in authorizing the WIN program in 1967 and in amendments to that program in subsequent years. It is my understanding that Congress intended, through the WIN program, merely to assist the States in the critical area of guiding able-bodied welfare recipients toward self-sufficiency—and not to supersede individual State programs designed to achieve the same end. Under this interpretation, New York and other States could operate their own programs as supplementary to the Federal WIN program. Is my understanding of the congressional intent in this area correct?

"Mr. Mills of Arkansas. I agree with the interpretation of my friend, the gentleman from New York, on the matter, so long as the State program does not contravene the provisions of Federal law." 118 Cong. Rec. 36931 (1972).

II

Persuasive affirmative reasons exist in this case which also strongly negate the view that Congress intended, by the enactment of the WIN legislation, to terminate all existing state work programs and foreclose additional state cooperative programs in the future. We note, first, that WIN itself was not designed on its face to be all embracing. Federal work incentive programs were to be established only in States and political subdivisions

> "in which [the Secretary of Labor] determines there is a significant number of individuals who have attained age 16 and are receiving aid to families with dependent children. In other political subdivisions, he shall use his best efforts to provide such programs either within such subdivisions or through the provision of transportation for such persons to political subdivisions of the State in which such programs are established." 42 U. S. C. § 632 (a) (1970 ed., Supp. I).

This section constitutes an express recognition that the federal statute probably would be limited in scope and application.[20] In New York, this has meant operation of WIN in only 14 of New York's 64 social service districts, though these 14 districts do service approximately 90% of the welfare recipients in the State. Yet the Secretary of Labor has not authorized additional WIN programs for the other districts, resulting in a lack of federal job placement opportunities in the more lightly populated areas of States and in those without adequate

[20] The WIN guidelines, issued by the United States Department of Labor, provide, according to appellants, for establishment of WIN programs only in those areas where there are at least 1,100 potential WIN enrollees. Brief for Appellant N. Y. State Depts. 37.

transportation of potential enrollees to districts with WIN programs.[21]

Even in the districts where WIN does operate, its reach is limited. In New York, according to federal estimates, there are 150,000 WIN registrants for the current fiscal year, but the Secretary of Labor has contracted with the State to provide services to only 90,000 registrants, of whom the majority will not receive full job training and placement assistance.[22] In fiscal 1971, New York asserts that "17,511 individuals were referred for participation in the WIN Program, but the Federal government allowed only 9,600 opportunities for enrollment." [23] California claims "over 122,000 employable AFDC recipients" last year, but only 18,000 available WIN slots.[24]

It is evident that WIN is a partial program which stops short of providing adequate job and training opportunities for large numbers of state AFDC recipients. It would be incongruous for Congress on the one hand to promote work opportunities for AFDC recipients and on the other to prevent States from undertaking supplementary efforts toward this very same end. We cannot

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[21] See *id.*, at 37–38. Title 42 U. S. C. § 602 (a)(19)(A)(iii) (1970 ed., Supp. I) may also have contemplated limited application of WIN, since it exempts from WIN registration "a person so remote from a work incentive project that his effective participation is precluded."

[22] See Brief for the United States as *Amicus Curiae* 15, citing U. S. Dept. of Labor, Manpower Administration, contract No. 36–2–0001–188, modification No. 3, June 30, 1972. The Government contends further that "the current level of WIN funding is such that no more than one-fifth of the WIN registrants will receive the full job training and placement assistance contemplated by the Act." *Ibid.*

[23] Brief for Appellant N. Y. State Depts. 38, 17.

[24] Brief for California as *Amicus Curiae* 3.

interpret federal statutes to negate their own stated purposes. The significance of state supplementation is illustrated by the experience in New York, where the Work Rules have aided the objectives of federal work incentives: from July 1 through September 30, 1971, the first months of the Work Rules' operation, the State Employment Service claimed job placements for approximately 9,376 recipients.[25]

Moreover, the Department of Health, Education, and Welfare, the agency of Government responsible for administering the Federal Social Security Act—including reviewing of state AFDC programs—has never considered the WIN legislation to be pre-emptive. HEW has followed consistently the policy of approving state plans containing welfare work requirements so long as those requirements are not arbitrary or unreasonable.[26] Congress presumably knew of this settled administrative policy at the time of enactment of WIN, when 21 States had welfare work programs. Subsequent to WIN's passage, HEW has continued to approve state work requirements. Pursuant to such approval, New York has re-

[25] Brief for Appellant N. Y. State Depts. 15; App. 192. Appellants claim further that from January to June 1972, "there were 2,657 job placements under the WIN Program," and 5,323 placements under the Work Rules. *Id.*, at 18. These figures must be qualified, however, with the observation that many of the job placements are temporary; that many of those placed under the Work Rules may have been recipients of forms of assistance other than AFDC (while the number of WIN placements counts only AFDC recipients); and that single recipients may have been referred or placed—and thus statistically tabulated—on more than one occasion. See Brief for Appellees 33–36. None of these observations, however, obscures the basic fact that the Work Rules materially contribute toward attainment of the objective of WIN in restoring employable AFDC recipients as wage-earning members of society. See 42 U. S. C. § 630 (1970 ed., Supp. I).

[26] See Brief for the United States as *Amicus Curiae* 3, filed by the Solicitor General and joined in by the General Counsel of HEW.

ceived federal grants-in-aid for the operation of its AFDC plan, including its work provisions.[27] In interpreting this statute, we must be mindful that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ." *Red Lion Broadcasting Co.* v. *FCC,* 395 U. S. 367, 381 (1969); *Dandridge* v. *Williams,* 397 U. S., at 481–482. In this case, such indications are wholly absent.

New York, furthermore, has attempted to operate the Work Rules in such a manner as to avoid friction and overlap with WIN. Officials from both the State Department of Labor and a local Social Service Department testified below that every AFDC recipient appropriate for WIN was first referred there, that no person was to be referred to the state program who was participating in WIN, and that only if there was no position available for him under WIN, was a recipient to be referred for employment pursuant to state statute.[28] Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.

In this context, the dissenting opinion's reliance on *Townsend* v. *Swank,* 404 U. S. 282 (1971), *Carleson* v. *Remillard,* 406 U. S. 598 (1972), and *King* v. *Smith,* 392 U. S. 309 (1968), is misplaced. In those cases it was clear that state law excluded people from AFDC benefits who the Social Security Act expressly provided would be eligible. The Court found no room either in the Act's

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[27] *Ibid.*

[28] Excerpts from depositions of Nelson Hopper, Director of the Employment Service Bureau of the New York State Dept. of Labor, and George Demmon, Senior Employment Counsellor, Erie County Dept. of Social Services, App. 226, 234. See also Brief for Appellant N. Y. State Depts. 17, and Tr. of Oral Arg. 7.

language or legislative history to warrant the States' additional eligibility requirements. Here, by contrast, the Act allows for complementary state work incentive programs and procedures incident thereto—even if they become conditions for continued assistance. Such programs and procedures are not necessarily invalid, any more than other supplementary regulations promulgated within the legitimate sphere of state administration. See *Wyman* v. *James*, 400 U. S. 309 (1971); *Snell* v. *Wyman*, 281 F. Supp. 853 (SDNY), aff'd, 393 U. S. 323 (1969). See also *Dandridge* v. *Williams, supra; Jefferson* v. *Hackney*, 406 U. S. 535 (1972).

III

We thus reverse the holding below that WIN preempts the New York Work Rules. Our ruling establishes the validity of a state work program as one means of helping AFDC recipients return to gainful employment. We do not resolve, however, the question of whether some particular sections of the Work Rules might contravene the specific provisions of the Federal Social Security Act.

This last question we remand to the court below. That court did not have the opportunity to consider the issue of specific conflict between the state and federal programs, free from its misapprehension that the Work Rules had been entirely pre-empted. Further, the New York Legislature amended the Work Rules in 1972 to provide, among other things, for exemption of persons engaged in full-time training and vocational rehabilitation programs from the reporting and check pick-up requirements (N. Y. Laws 1972, c. 683), for monthly rather than semi-monthly payments of shelter allowances (*id.*, c. 685) and, most significantly, for a definition of an "employable" AFDC recipient which is claimed by New York to be identical to that now used

under WIN (*id.*, c. 941). Inasmuch as the court below did not have the opportunity to consider the 1972 amendments as they related to the issue of potential state-federal conflict, the remand should afford it.

We deem it unnecessary at the present time to intimate any view on whether or to what extent particular provisions of the Work Rules may contravene the purposes or provisions of WIN. Such a determination should be made initially by the court below, consistent with the principles set forth in this opinion.[29]

The judgment of the three-judge District Court is reversed and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Because the Court today ignores a fundamental rule for interpreting the Social Security Act, I must respectfully dissent. As we said in *Townsend* v. *Swank*, 404 U. S. 282, 286 (1971), "in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state

[29] In considering the question of possible conflict between the state and federal work programs, the court below will take into account our prior decisions. Congress "has given the States broad discretion," as to the AFDC program, *Jefferson* v. *Hackney*, 406 U. S. 535, 545 (1972); see also *Dandridge* v. *Williams*, 397 U. S., at 478; *King* v. *Smith*, 392 U. S. 309, 318–319 (1968), and "[s]o long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act," the courts may not void them. *Jefferson*, *supra*, at 541. Conflicts, to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial. But if there is a conflict of substance as to eligibility provisions, the federal law of course must control. *King* v. *Smith*, *supra*; *Townsend* v. *Swank*, 404 U. S. 282 (1971); *Carleson* v. *Remillard*, 406 U. S. 598 (1972).

eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." See also *King* v. *Smith*, 392 U. S. 309 (1968); *Carleson* v. *Remillard*, 406 U. S. 598, 600 (1972). The New York Work Rules fall squarely within this statement; they clearly exclude persons eligible for assistance under federal standards, and it could hardly be maintained that they did not impose additional conditions of eligibility.[1] For example, under federal standards, it is irrelevant to a determination of eligibility that a recipient has or has not filed every two weeks a certificate from the local employment office that no suitable employment opportunities are available, yet under the Work Rules, a recipient who fails to file such a certificate is "deemed" to have refused to accept suitable employment, and so is not eligible for assistance. N. Y. Soc. Serv. Law § 131 (4)(a) (Supp. 1971–1972).[2] Thus, according to the rules of interpretation we have heretofore followed, the proper inquiry is whether the Social Security Act or its legislative history clearly shows congressional authorization for state employment requirements other than those involved in WIN.[3]

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[1] Appellants state that the Work Rules do not "constitute an additional condition of eligibility for public assistance." Reply Brief for Appellant N. Y. State Depts. 9. The arguments they present, however, relate entirely to the purported congressional authorization for additional conditions of this sort.

[2] The federal conditions of eligibility relating to registration for employment are found in 42 U. S. C. § 602 (a)(19) (1970 ed., Supp. I).

[3] The United States, as *amicus curiae*, argues that the rule stated in *Townsend* v. *Swank*, 404 U. S. 282 (1971), does not fairly characterize the course of our interpretation of the Social Security Act. It relies primarily on the Court's decision in *Wyman* v. *James*,

The answer is that neither the Act nor its legislative history shows such an authorization. The only relevant work-related conditions of eligibility in the Act are found at 42 U. S. C. § 602 (a)(19) (1970 ed., Supp. I). In addition to exempting certain persons from registration for and participation in WIN,[4] the Act permits States to

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400 U. S. 309 (1971). But, for reasons that escaped me at the time, see *id.*, at 345 n. 7, the Court did not address the statutory argument. *Wyman* does not, therefore, express any limitation on the rule in *Townsend*. Similarly, our summary affirmance in *Snell* v. *Wyman*, 393 U. S. 323 (1969), where the District Court did not have before it our opinion in *King* v. *Smith*, 392 U. S. 309 (1968), is at least offset by the summary affirmances in *Carleson* v. *Taylor*, 404 U. S. 980 (1971), *Juras* v. *Meyers*, 404 U. S. 803 (1971), and *Weaver* v. *Doe*, 404 U. S. 987 (1971).

The United States' argument from authority is weak, and its argument as a matter of logic is even weaker. The United States suggests that, while States may not narrow the class of persons eligible for assistance under federal standards, they may impose additional conditions of eligibility in pursuit of independent state policies. This distinction will not withstand analysis, for it makes decision turn on meaningless verbal tricks. One could just as easily find an independent state policy in *Townsend* as a narrowing of the class of eligible persons: the State might have a policy of minimizing subsidies to persons with a clear prospect of future income well above the poverty level, by denying assistance to persons attending four-year colleges while granting it to those attending vocational training schools. Such a system of subsidies would almost certainly be held constitutional under the Due Process Clause, and the position of the United States seems to be that States may impose conditions of eligibility, not squarely in conflict with federal standards, in the pursuit of some constitutional state interest.

[4] For example, no child under 16 or attending school full time need register. 42 U. S. C. § 602 (a)(19)(A)(i) (1970 ed., Supp. I). I take it that the Court would find a conflict "of substance," *ante*, at 423 n. 29, between this provision and a state work requirement applicable to children under 16. For the legislative history is clear that Congress, in defining the work-related conditions of eligibility, "spell[ed] out those people we think should not be required to go to

disregard the needs of persons otherwise eligible for assistance who "have refused without good cause to participate under a work incentive program . . . or . . . to accept employment in which he is able to engage." 42 U. S. C. § 602 (a)(19)(F) (1970 ed., Supp. I). The Act thus makes *actual* refusal to participate in a WIN Program or to accept employment a permissible ground for denying assistance. In contrast, New York has adopted the none-too-subtle technique of "deeming" persons not to have accepted employment because they have not, for example, obtained a certain certificate from the local employment office every two weeks. "Deeming" is a familiar legal device to evade applicable requirements by saying that they have been satisfied when they have not in fact been satisfied. But the federal requirement, which the State may not alter without clear congressional authorization,[5] requires an actual refusal to participate in a WIN Program or to accept employment, not a refusal to participate in some other program or a fictitious refusal of employment.[6]

The legislative history of the Social Security Act confirms this interpretation, for whenever Congress legislated

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work," as Senator Long put it. 113 Cong. Rec. 32593 (1967). See also S. Rep. No. 744, 90th Cong., 1st Sess., 26. The United States' position would be, I assume, that such a provision would narrow the class of persons eligible for assistance.

[5] Appellants argue that "the provision of section 602 (a)(10) that aid be furnished 'to all eligible individuals' when read within the context of the Social Security Act means individuals 'eligible' under State requirements, not Federal." Reply Brief for Appellant N. Y. State Depts. 13. We expressly rejected this argument in *Townsend*, 404 U. S., at 286.

[6] The States may, of course, adopt procedures necessary to insure that offers of employment are transmitted to recipients of public assistance. It hardly needs extended argument, however, to show that the New York Work Rules, taken as a whole, are not necessary to do that.

with respect to work requirements, it focused on actual refusals to accept employment or to participate in certain special programs clearly authorized by Congress. At no time has Congress authorized States to adopt other work-referral programs or to make refusal to participate in such programs a condition of eligibility, even under the guise of "deeming" such a refusal a refusal to accept employment.

At its inception, the program of Aid to Dependent Children was designed to lessen somewhat the burden of supporting such children. The program provided assistance to children who had been deprived of parental support by reason of the absence of a parent. 49 Stat. 629 (1935). Assistance was provided to supply the needs of such children, thus "releas[ing the parent] from the wage-earning role." H. R. Doc. No. 81, 74th Cong., 1st Sess., 30 (1935). See also H. R. Rep. No. 615, 74th Cong., 1st Sess., 10 (1935). Thus, the program's purposes were in many ways inconsistent with a requirement that the parent leave the home to accept employment. Yet, in operation, the original program failed to provide sufficient inducement for the parent to remain at home, since the amount of assistance was measured solely by the child's needs. In order further to relieve the pressures on the parent to leave the home and accept work, Congress amended the Act in 1950 so that the aid would include payments "to meet the needs of the relative with whom any dependent child is living." 42 U. S. C. § 606 (b)(1).

Until 1961, then, the sole emphasis of the Social Security Act's provisions for assistance to dependent children was on preserving the integrity of the family unit.[7]

[7] In 1956, Congress required States to adopt plans to provide social services to strengthen family life. Pub. L. 880, § 312, 70 Stat. 848.

In that year, Congress expanded the definition of dependent child to include children deprived of parental support by reason of the unemployment of a parent. 42 U. S. C. § 607. Families with two parents present could, for the first time, receive assistance, and one parent could leave the home to work without impairing the integrity of the family unit. Congress therefore required States participating in the program for aid to families with an unemployed parent to deny assistance under this provision to individuals who refused to accept bona fide offers of employment. Pub. L. 87–31, 75 Stat. 76 (1961). Refusal of actual offers of employment was clearly the contemplated condition. See S. Rep. No. 165, 87th Cong., 1st Sess., 3 (1961). Congress then developed this concept, permitting States to establish "Community Work and Training Programs" of work on public projects, Pub. L. 87–543, § 105, 76 Stat. 186, rendered inapplicable by Pub. L. 90–248, 81 Stat. 892. Refusal to accept a work assignment on such a project without good cause would be a ground for denial of public assistance. See H. R. Rep. No. 1414, 87th Cong., 2d Sess., 15 (1962).

When Congress established WIN, it did not abandon its previous policies. Recipients of public assistance could be required only to accept bona fide offers of employment or placement in specified programs. There is no indication whatsoever in the legislative history that Congress intended to permit States to deny assistance because potential recipients had refused to participate in programs not supervised by the Secretary of Labor, as WIN Programs are. The parameters of the WIN Program were designed to accommodate Congress' dual interests in guaranteeing the integrity of the family and in maximizing the potential for employment of recipients of public assistance. Without careful federal supervision, of the sort contemplated by the delegation to

the Secretary of Labor to establish testing and counseling services and to require that States design employability plans, 81 Stat. 885, state work programs might upset the accommodation that Congress sought. The Work Incentive Program was thus a carefully coordinated system, whose individual parts fit into an integrated whole. It is hardly surprising that Congress did not expressly or impliedly authorize States to develop independent work programs, since the WIN Program represented Congress' recognition that such programs had to be kept under careful scrutiny if the variety of goals Congress sought to promote were to be achieved.[8] I believe that the Court seriously misconceives the purposes of the federal programs of public assistance, in its apparent belief that Congress had the sole purpose of promoting work opportunities, a purpose that precluding additional state programs would negate. *Ante*, at 418–420.

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[8] The original proposal for a Work Incentive Program would have permitted a State to operate Community Work and Training Programs only if a federal WIN Program were not operated in the State. H. R. 5710, 90th Cong., 1st Sess., § 204 (a). Thus, either a WIN Program or a state program could operate within a State, but not both. In the final version, the pre-existing authorization for Community Work and Training Programs was eliminated, and the Federal WIN Program was to be implemented in every State. Again, Congress recognized that federal and state work programs could not coexist.

The 1971 Amendments to the WIN Program, Pub. L. 92–223, 85 Stat. 802, further demonstrate Congress' desire to have federal control of work requirements. Each State must establish a "separate administrative unit" to provide social services only in connection with WIN. 42 U. S. C. § 602 (a)(19)(G) (1970 ed., Supp. I). It would be anomalous for Congress to require the States to devote substantial resources to such a unit in connection with the WIN Program, and yet to permit the States to operate independent work programs using federal funds without providing the special services that Congress thought so important.

Instead, Congress has consistently indicated its desire to adopt programs that will enhance the employability of recipients of public assistance while maintaining the integrity of families receiving assistance. A work-referral program can do this only if it is regulated, both as to the persons required to participate and as to the terms on which they must participate. And Congress has consistently recognized that such regulation requires close federal supervision of work programs. In my view, this course of legislation, which is not mentioned by the Court, is neither "ambiguous," "fragmentary," nor "peripheral," *ante*, at 415, 416, 417. No matter how it is viewed, however, one cannot fairly say that the Social Security Act or its legislative history clearly evidences congressional authorization for making participation in state work programs a condition of eligibility for public assistance.[9]

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[9] It is unnecessary for me to discuss at any length the Court's analysis of the pre-emption problem. I note, as the Court does, *ante*, at 411 n. 9, that this case does not present the classic question of pre-emption, that is, does the enactment of a statute by Congress preclude state attempts to regulate the same subject? There is no question that New York may impose whatever work requirements it wishes, consistent only with constitutional limitations, when it gives public assistance solely from state funds. See *ante*, at 412. The question here relates to the conditions that Congress has placed on state programs supported by federal funds. The distinction is not without importance, for it makes inapposite the strictures in our earlier cases and relied on by the Court, against lightly interfering with state programs. *Ante*, at 413–414. For we must, of course, be cautious when we prevent a State from regulating in an area where, in the absence of congressional action, it has important interests. Holding that the Federal WIN Program is the exclusive method of imposing work requirements in conjunction with federally funded programs of public assistance would have no such impact; New York would remain free to operate public assistance programs with state funds, with whatever work requirements it chose.

The policy of clear statement [10] in *Townsend* serves a useful purpose. It informs legislators that, if they wish to alter the accommodations previously arrived at in an Act of major importance, they must indicate clearly that wish, since what may appear to be minor changes of narrow scope may in fact have ramifications throughout the administration of the Act. A policy of clear statement insures that Congress will consider those ramifications,[11] but only if it is regularly adhered to.

Finally, it is particularly appropriate to require clear statement of authorization to impose additional conditions of eligibility for public assistance. Myths abound in this area. It is widely yet erroneously believed, for

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[10] See H. Hart & A. Sacks, The Legal Process 1240 (tent. ed. 1958).

[11] In this connection, I cannot let pass without comment the extraordinary use the Court makes of legislative "history," in relying on exchanges on the floor of the House and Senate that occurred *after* the decision by the District Court in this case. *Ante,* at 416–417, n. 19. Although reliance on floor exchanges has been criticized in this Court, *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384, 395–397 (1951) (Jackson, J., concurring), there is some force to the more generally accepted proposition that such exchanges, particularly when sponsors of a bill or committee chairmen are involved, are relevant to a determination of the purpose Congress sought to achieve in enacting the bill. *United States* v. *St. Paul, M. & M. R. Co.,* 247 U. S. 310, 318 (1918). For legislators know how legislative history is made, and they ought to be aware of the importance of floor exchanges. If they disagree with the interpretation placed on the bill in such exchanges, they may offer amendments or vote against it. Thus, Congress, in enacting a statute, may fairly be taken to have endorsed the interpretations offered in such exchanges. None of this is true of post-enactment floor exchanges, which have no bearing on pending legislation and to which a disinterested legislator might well pay scant attention. If Senator Buckley and Representative Carey wished to have a congressional expression of intent on the issue of pre-emption, they were not barred from introducing legislation.

example, that recipients of public assistance have little desire to become self-supporting. See, *e. g.*, L. Goodwin, Do the Poor Want to Work? 5, 51–52, 112 (1972). Because the recipients of public assistance generally lack substantial political influence, state legislators may find it expedient to accede to pressures generated by misconceptions. In order to lessen the possibility that erroneous beliefs will lead state legislators to single out politically unpopular recipients of assistance for harsh treatment, Congress must clearly authorize States to impose conditions of eligibility different from the federal standards. As we observed in *King* v. *Smith,* 392 U. S., at 318–319, this rule leaves the States with "considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." The Court today quotes this observation but misses its import. The States have latitude to adjust benefits in the two ways mentioned, but not by imposing additional conditions of eligibility. When across-the-board adjustments like those are made, legislators cannot single out especially unpopular groups for discriminatory treatment.[12]

For these reasons, I would affirm the judgment of the District Court.

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[12] That the possibility of treatment that is so discriminatory as to be unconstitutional is not insubstantial is shown by the Court's brief discussion of the jurisdiction of the District Court, *ante,* at 412 n. 11.

Syllabus

CADY, WARDEN *v.* DOMBROWSKI

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72–586. Argued March 21, 1973—Decided June 21, 1973

Respondent had a one-car accident near a small Wisconsin town, while driving a rented Ford. The police had the car towed to a garage seven miles from the police station, where it was left unguarded outside. Respondent was arrested for drunken driving. Early the next day, an officer, looking for a service revolver which respondent (who had identified himself as a Chicago policeman) was thought to possess, made a warrantless search of the car and found in the trunk several items, some bloodied, which he removed. Later, on receipt of additional information emanating from respondent, a blood-stained body was located on respondent's brother's farm in a nearby county. Thereafter, through the windows of a disabled Dodge which respondent had left on the farm before renting the Ford, an officer observed other bloodied items. Following issuance of a search warrant, materials were taken from the Dodge, two of which (a sock and floor mat) were not listed in the return on the warrant among the items seized. Respondent's trial for murder, at which items seized from the cars were introduced in evidence, resulted in conviction which was upheld on appeal. In this habeas corpus action, the Court of Appeals reversed the District Court and held that certain evidence at the trial had been unconstitutionally seized. *Held:*

1. The warrantless search of the Ford did not violate the Fourth Amendment as made applicable to the States by the Fourteenth. The search was not unreasonable since the police had exercised a form of custody of the car, which constituted a hazard on the highway, and the disposition of which by respondent was precluded by his intoxicated and later comatose condition; and the revolver search was standard police procedure to protect the public from a weapon's possibly falling into improper hands. *Preston* v. *United States,* 376 U. S. 364, distinguished; *Harris* v. *United States,* 390 U. S. 234, followed. Pp. 439–448.

2. The seizure of the sock and floor mat from the Dodge was not invalid, since the Dodge, the item "particularly described," was the subject of a proper search warrant. It is not constitutionally significant that the sock and mat were not listed in the

warrant's return, which (contrary to the assumption of the Court of Appeals) was not filed prior to the search, and the warrant was thus validly outstanding at the time the articles were discovered. Pp. 448–450.

471 F. 2d 280, reversed.

REHNQUIST, J., wrote the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, STEWART, and MARSHALL, JJ., joined, *post*, p. 450.

LeRoy L. Dalton, Assistant Attorney General of Wisconsin, argued the cause for petitioner. With him on the briefs was *Robert W. Warren*, Attorney General.

William J. Mulligan, by appointment of the Court, 410 U. S. 952, argued the cause for respondent. With him on the brief was *David E. Leichtfuss.**

Opinion of the Court by MR. JUSTICE REHNQUIST, announced by MR. JUSTICE BLACKMUN.

Respondent Chester J. Dombrowski, was convicted in a Wisconsin state court of first-degree murder of Herbert McKinney and sentenced to life imprisonment. The conviction was upheld on appeal, *State* v. *Dombrowski*, 44 Wis. 2d 486, 171 N. W. 2d 349 (1969), the Wisconsin Supreme Court rejecting respondent's contention that certain evidence admitted at the trial had been unconstitutionally seized. Respondent then filed a petition for a writ of habeas corpus in federal district court, asserting the same constitutional claim. The District Court denied the petition but the United States Court of Appeals for the Seventh Circuit reversed, holding that one of the searches was unconstitutional under *Preston* v. *United States*, 376 U. S. 364 (1964), and the other unconstitu-

**Robert L. Shevin*, Attorney General, and *A. S. Johnston*, Assistant Attorney General, filed a brief for the State of Florida as *amicus curiae* urging reversal.

tional for unrelated reasons. 471 F. 2d 280 (1972). We granted certiorari, 409 U. S. 1059 (1972).

I

On September 9, 1969, respondent was a member of the Chicago, Illinois, police force and either owned or possessed a 1960 Dodge automobile. That day he drove from Chicago to West Bend, Wisconsin, the county seat of Washington County, located some hundred-odd miles northwest of Chicago. He was identified as having been in two taverns in the small town of Kewaskum, Wisconsin, seven miles north of West Bend, during the late evening of September 9 and the early morning of September 10. At some time before noon on the 10th, respondent's automobile became disabled, and he had it towed to a farm owned by his brother in Fond du Lac County, which adjoins Washington County on the north. He then drove back to Chicago early that afternoon with his brother in the latter's car.

Just before midnight of the same day, respondent rented a maroon 1967 Ford Thunderbird at O'Hare Field outside of Chicago, and apparently drove back to Wisconsin early the next morning. A tenant on his brother's farm saw a car answering the description of the rented car pull alongside the disabled 1960 Dodge at approximately 4 a. m. At approximately 9:30 a. m. on September 11, respondent purchased two towels, one light brown and the other blue, from a department store in Kewaskum.

From 7 to 10:15 p. m. of the 11th, respondent was in a steak house or tavern in West Bend. He ate dinner and also drank, apparently quite heavily. He left the tavern and drove the 1967 Thunderbird in a direction away from West Bend toward his brother's farm. On the way, respondent had an accident, with the Thunderbird breaking through a guard rail and crashing into a

bridge abutment. A passing motorist drove him into Kewaskum, and, after being let off in Kewaskum, respondent telephoned the police. Two police officers picked him up at a tavern and drove to the scene of the accident. On the way, the officers noticed that respondent appeared to be drunk; he offered three conflicting versions of how the accident occurred.

At the scene, the police observed the 1967 Thunderbird and took various measurements relevant to the accident. Respondent was, in the opinion of the officers, drunk. He had informed them that he was a Chicago police officer. The Wisconsin policemen believed that Chicago police officers were required by regulation to carry their service revolvers at all times. After calling a towtruck to remove the disabled Thunderbird, and not finding the revolver on respondent's person, one of the officers looked into the front seat and glove compartment of that car for respondent's service revolver. No revolver was found. The wrecker arrived and the Thunderbird was towed to a privately owned garage in Kewaskum, approximately seven miles from the West Bend police station. It was left outside by the wrecker, and no police guard was posted. At 11:33 p. m. on the 11th respondent was taken directly to the West Bend police station from the accident scene, and, after being interviewed by an assistant district attorney, to whom respondent again stated he was a Chicago policeman, respondent was formally arrested for drunken driving. Respondent was "in a drunken condition" and "incoherent at times." Because of his injuries sustained in the accident, the same two officers took respondent to a local hospital. He lapsed into an unexplained coma, and a doctor, fearing the possibility of complications, had respondent hospitalized overnight for observation. One of the policemen remained at the hospital as a guard, and the other, Officer Weiss, drove at some time after

2 a. m. on the 12th to the garage to which the 1967 Thunderbird had been towed after the accident.

The purpose of going to the Thunderbird, as developed on the motion to suppress, was to look for respondent's service revolver. Weiss testified that respondent did not have a revolver when he was arrested, and that the West Bend authorities were under the impression that Chicago police officers were required to carry their service revolvers at all times. He stated that the effort to find the revolver was "standard procedure in our department."

Weiss opened the door of the Thunderbird and found, on the floor of the car, a book of Chicago police regulations and, between the two front seats, a flashlight which appeared to have "a few spots of blood on it." He then opened the trunk of the car, which had been locked, and saw various items covered with what was later determined to be type O blood. These included a pair of police uniform trousers, a pair of gray trousers, a nightstick with the name "Dombrowski" stamped on it, a raincoat, a portion of a car floor mat, and a towel. The blood on the car mat was moist. The officer removed these items to the police station.

When, later that day, respondent was confronted with the condition of the items discovered in the trunk, he requested the presence of counsel before making any statement. After conferring with respondent, a lawyer told the police that respondent "authorized me to state he believed there was a body lying near the family picnic area at the north end of his brother's farm."

Fond du Lac County police went to the farm and found, in a dump, the body of a male, later identified as the decedent McKinney, clad only in a sportshirt. The deceased's head was bloody; a white sock was found near the body. In observing the area, one officer looked through the window of the disabled 1960 Dodge, located

not far from where the body was found, and saw a pillowcase, backseat, and briefcase covered with blood. Police officials obtained, on the evening of the 12th, returnable within 48 hours, warrants to search the 1960 Dodge and the 1967 Thunderbird, as well as orders to impound both automobiles. The 1960 Dodge was examined at the farm on the 12th and then towed to the police garage where it was held as evidence. On the 13th, criminologists came from the Wisconsin Crime Laboratory in Madison and searched the Dodge; they seized the back and front seats, a white sock covered with blood, a part of a bloody rear floor mat, a briefcase, and a front floor mat. A return of the search warrant was filed in the county court on the 14th, but it did not recite that the sock and floor mat had been seized. At a hearing held on the 14th, the sheriff who executed the warrant did not specifically state that these two items had been seized.

At the trial, the State introduced testimony tending to establish that the deceased was first hit over the head and then shot with a .38-caliber gun, dying approximately an hour after the gunshot wound was inflicted; that death occurred at approximately 7 a. m. on the 11th, with a six-hour margin of error either way; that respondent owned two .38-caliber guns; that respondent had type A blood; that the deceased had type O blood and that the bloodstains found in the 1960 Dodge and on the items found in the two cars were type O.

The prosecution introduced the nightstick discovered in the 1967 Thunderbird, and testimony that it had traces of type O blood on it; the portion of the floor mat found in the 1967 car, with testimony that it matched the portion of the floor mat found in the 1960 Dodge; the bloody towel found in the 1967 car, with testimony that it was identical to one of the towels purchased by respondent on the 11th; the police uniform trousers; and the sock

found in the 1960 Dodge, with testimony that it was identical in composition and stitching to that found near the body of the deceased.

The State's case was based wholly on circumstantial evidence. The Supreme Court of Wisconsin, in reviewing the conviction on direct appeal, stated that "even though the evidence that led to his conviction was circumstantial, we have seldom seen a stronger collection of such evidence assembled and presented by the prosecution." *State* v. *Dombrowski*, 44 Wis. 2d, at 507, 171 N. W. 2d, at 360.

II

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The ultimate standard set forth in the Fourth Amendment is reasonableness. In construing this command, there has been general agreement that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, 387 U. S. 523, 528–529 (1967). See *Coolidge* v. *New Hampshire*, 403 U. S. 443, 454–455 (1971). One class of cases which constitutes at least a partial exception to this general rule is automobile searches. Although vehicles are "effects" within the meaning of the Fourth Amendment, "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." *Chambers* v. *Maroney*, 399 U. S. 42, 52 (1970). See *Carroll* v.

United States, 267 U. S. 132, 153–154 (1925). In *Cooper* v. *California*, 386 U. S. 58, 59 (1967), the identical proposition was stated in different language:

> "We made it clear in *Preston* [v. *United States*] that whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case and pointed out, in particular, that searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property. 376 U. S., at 366–367."

While these general principles are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web.

Since this Court's decision in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), which overruled *Wolf* v. *Colorado*, 338 U. S. 25 (1949), and held that the provisions of the Fourth Amendment were applicable to the States through the Due Process Clause of the Fourteenth Amendment, the application of Fourth Amendment standards, originally intended to restrict only the Federal Government, to the States presents some difficulty when searches of automobiles are involved. The contact with vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle. Cases such as *Carroll* v. *United States*, *supra*, and *Brinegar* v. *United States*, 338 U. S. 160 (1949), illustrate the typical situations in which federal officials come into contact with and search vehicles. In both cases, members of a special federal unit charged with enforcing a particular federal criminal

statute stopped and searched a vehicle when they had probable cause to believe that the operator was violating that statute.

As a result of our federal system of government, however, state and local police officers, unlike federal officers, have much more contact with vehicles for reasons related to the operation of vehicles themselves. All States require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways.

Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Although the original justification advanced for treating automobiles differently from houses, insofar as warrantless searches of automobiles by federal officers was concerned, was the vagrant and mobile nature of the former, *Carroll* v. *United States, supra; Brinegar* v. *United States, supra;* cf. *Coolidge* v. *New Hampshire, supra; Chambers* v. *Maroney, supra,* warrantless searches of vehicles by state officers have been sustained in cases in which the possibilities of the vehicle's being removed

or evidence in it destroyed were remote, if not nonexistent. See *Harris* v. *United States*, 390 U. S. 234 (1968) (District of Columbia police); *Cooper* v. *California*, *supra*. The constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in "plain view" of evidence, fruits, or instrumentalities of a crime, or contraband. Cf. *United States* v. *Biswell*, 406 U. S. 311 (1972).

Here we must decide whether a "search"† of the trunk of the 1967 Ford was unreasonable solely because the local officer had not previously obtained a warrant. And, if that be answered in the negative, we must then determine whether the warrantless search was unreasonable within the meaning of the Fourth and Fourteenth Amendments. In answering these questions, two factual considerations deserve emphasis. First, the police had ex-

†Petitioner argued before this Court that unlocking the trunk of the Ford did not constitute a "search" within the meaning of the Fourth Amendment. The thesis is that only an intrusion, into an area in which an individual has a reasonable expectation of privacy, with the specific intent of discovering evidence of a crime constitutes a search. Compare *Haerr* v. *United States*, 240 F. 2d 533 (CA5 1957), with *District of Columbia* v. *Little*, 85 U. S. App. D. C. 242, 178 F. 2d 13 (1949), aff'd on other grounds, 339 U. S. 1 (1950). But see *Camara* v. *Municipal Court*, 387 U. S. 523 (1967). Arguing that the officer's conduct constituted an "inspection" rather than a "search," petitioner relies on our decision in *Harris* v. *United States*, 390 U. S. 234 (1968), to validate the initial intrusion into the trunk, and then the plain-view doctrine to justify the warrantless seizure of the items.

We need not decide this issue. Petitioner conceded in the Court of Appeals that this intrusion was a search. Inasmuch as we believe that *Harris* and other decisions control this case even if the intrusion is characterized as a search, we need not deal with petitioner's belated contention.

ercised a form of custody or control over the 1967 Thunderbird. Respondent's vehicle was disabled as a result of the accident, and constituted a nuisance along the highway. Respondent, being intoxicated (and later comatose), could not make arrangements to have the vehicle towed and stored. At the direction of the police, and for elemental reasons of safety, the automobile was towed to a private garage. Second, both the state courts and the District Court found as a fact that the search of the trunk to retrieve the revolver was "standard procedure in [that police] department," to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands. Although the trunk was locked, the car was left outside, in a lot seven miles from the police station to which respondent had been taken, and no guard was posted over it. For reasons not apparent from the opinion of the Court of Appeals, that court concluded that as "no further evidence was needed to sustain" the drunk-driving charge, "[t]he search must therefore have been for incriminating evidence of other offenses." 471 F. 2d, at 283. While that court was obligated to exercise its independent judgment on the underlying constitutional issue presented by the facts of this case, it was not free on this record to disregard these findings of fact. Particularly in nonmetropolitan jurisdictions such as those involved here, enforcement of the traffic laws and supervision of vehicle traffic may be a large part of a police officer's job. We believe that the Court of Appeals should have accepted, as did the state courts and the District Court, the findings with respect to Officer Weiss' specific motivation and the fact that the procedure he followed was "standard."

The Court of Appeals relied, and respondent now relies, primarily on *Preston* v. *United States,* 376 U. S. 364

(1964), to conclude that the warrantless search was unconstitutional and the seized items inadmissible. In that case, the police received a telephone call at 3 a. m. from a caller who stated that "three suspicious men acting suspiciously" had been in a car in the business district of Newport, Kentucky, for five hours; four policemen investigated and, after receiving evasive explanations and learning that the suspects were unemployed and apparently indigent, arrested the three for vagrancy. The automobile was cursorily searched, then towed to a police station and ultimately to a garage, where it was searched after the three men had been booked. That search revealed two revolvers in the glove compartment; a subsequent search of the trunk resulted in the seizure of various items later admitted in a prosecution for conspiracy to rob a federally insured bank. In that case the respondent attempted to justify the warrantless search of the trunk and seizure of the items therein "as incidental to a lawful arrest." *Id.*, at 367. The Court rejected the asserted "search incident" justification for the warrantless search in the following terms:

> "But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Ibid.*

It would be possible to interpret *Preston* broadly, and to argue that it stands for the proposition that on those facts there could have been no constitutional justification advanced for the search. But we take the opinion as written, and hold that it stands only for the proposition that the search challenged there could not be justified as one incident to an arrest. See *Chambers* v. *Maroney, supra; Cooper* v. *California, supra.* We believe that the instant case is controlled by principles

that may be extrapolated from *Harris* v. *United States, supra,* and *Cooper* v. *California, supra.*

In *Harris,* petitioner was arrested for robbery. As petitioner's car had been identified leaving the site of the robbery, it was impounded as evidence. A regulation of the District of Columbia Police Department required that an impounded vehicle be searched, that all valuables be removed, and that a tag detailing certain information be placed on the vehicle. In compliance with this regulation, and without a warrant, an officer searched the car and, while opening one of the doors, spotted an automobile registration card, belonging to the victim, lying face up on the metal door stripping. This item was introduced into evidence at petitioner's trial for robbery. In rejecting the contention that the evidence was inadmissible, the Court stated:

> "The admissibility of evidence found as a result of a search under the police regulation is not presented by this case. The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.
>
> "Once the door had lawfully been opened, the registration card . . . was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." 390 U. S., at 236.

In *Cooper,* the petitioner was arrested for selling heroin, and his car impounded pending forfeiture proceedings. A week later, a police officer searched the car

and found, in the glove compartment, incriminating evidence subsequently admitted at petitioner's trial. This Court upheld the validity of the warrantless search and seizure with the following language:

> "This case is not *Preston*, nor is it controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the State had 'legal title' to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." 386 U. S., at 61–62.

These decisions, while not on all fours with the instant case, lead us to conclude that the intrusion into the trunk of the 1967 Thunderbird at the garage was not unreasonable within the meaning of the Fourth and Fourteenth Amendments solely because a warrant had not been obtained by Officer Weiss after he left the hospital. The police did not have actual, physical custody of the vehicle as in *Harris* and *Cooper*, but the vehicle had been towed there at the officers' directions. These officers in a rural area were simply reacting to the effect of an accident—one of the recurring practical situations that results from the operation of motor vehicles and with which local police officers must deal every day. The Thunderbird was not parked adjacent

to the dwelling place of the owner as in *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971), nor simply momentarily unoccupied on a street. Rather, like an obviously abandoned vehicle, it represented a nuisance, and there is no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure.

In *Harris* the justification for the initial intrusion into the vehicle was to safeguard the owner's property, and in *Cooper* it was to guarantee the safety of the custodians. Here the justification, while different, was as immediate and constitutionally reasonable as those in *Harris* and *Cooper:* concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle. The record contains uncontradicted testimony to support the findings of the state courts and District Court. Furthermore, although there is no record basis for discrediting such testimony, it was corroborated by the circumstantial fact that at the time the search was conducted Officer Weiss was ignorant of the fact that a murder, or any other crime, had been committed. While perhaps in a metropolitan area the responsibility to the general public might have been discharged by the posting of a police guard during the night, what might be normal police procedure in such an area may be neither normal nor possible in Kewaskum, Wisconsin. The fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, by itself, render the search unreasonable. Cf. *Chambers* v. *Maroney, supra.*

The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody nor on

the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions, see *Cooper* v. *California, supra, Harris* v. *United States, supra, Chambers* v. *Maroney, supra,* and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this. Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments.

III

The Wisconsin Supreme Court ruled that the sock and the portion of the floor mat were validly seized from the 1960 Dodge. The Fond du Lac county officer who looked through the window of the Dodge after McKinney's body had been found saw the bloody seat and briefcase, but not the sock or floor mat. Consequently, these two items were not listed in the application for the warrant, but the Dodge was the item "particularly described" to be searched in the warrant. The warrant was validly issued and the police were authorized to search the car. The reasoning of the Wisconsin Supreme Court was that although these items were not listed to be seized in the warrant, the warrant was valid and in executing it the officers discovered the sock and mat in plain view and therefore could constitutionally seize them without a warrant.

The Court of Appeals held that the seizure of the two items on September 13 could not be justified under the plain-view doctrine. The reasoning of that court hinged on its understanding that the warrant to search the Dodge had been returned and was *functus officio* by the time Officer Mauer of the Crime Laboratory came upon the sock and the floor mat. The court stated:

> "There was no continuing authority under the warrant issued the previous night [the 12th]. First, these items were not described in the warrant and presumably were not observed that night [the 12th]. Second, when the warrant was returned—before Mauer came on the scene—it was *functus officio*. A 'new ball game,' so to speak, began when Mauer made his 'inspection.'" 471 F. 2d, at 286.

The record is so indisputably clear that the return of the warrant was filed on the 14th, not sometime prior to Mauer's search on the 13th, that we are somewhat at a loss to understand how the Court of Appeals arrived at its factual conclusion. The warrant to search the Dodge was issued on the 12th, and, although a return of the warrant was prepared by a Fond du Lac County officer at some time on the 13th (whether before or after Mauer's search is impossible to determine), it was not filed in the state court until the 14th, at which time a hearing was held. The seizures of the sock and the floor mat occurred while a valid warrant was outstanding, and thus could not be considered unconstitutional under the theory advanced below. As these items were constitutionally seized, we do not deem it constitutionally significant that they were not listed in the return of the warrant. The ramification of that "defect," if such it was, is purely a question of state law.

We therefore need not reach the question of whether the seizure of the two items from the Dodge would have

been valid because the entire car had been validly seized as evidence and impounded pursuant to a valid warrant, cf. *Harris* v. *United States, supra; Cooper* v. *California, supra,* or whether a search of the back seat of this car, located as it was in an open field, required a search warrant at all. See *Hester* v. *United States,* 265 U. S. 57, 59 (1924).

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

In upholding the warrantless search of respondent's rented Thunderbird, the Court purports merely to rely on our prior decisions dealing with automobile searches. It is clear to me, however, that nothing in our prior decisions supports either the reasoning or the result of the Court's decision today. I therefore dissent and would hold the search of the Thunderbird unconstitutional under the Fourth and Fourteenth Amendments.

The relevant facts are these. Respondent, an off-duty Chicago policeman, was arrested by police on a charge of drunken driving following a one-car automobile accident in which respondent severely damaged his rented 1967 Thunderbird. The car was towed from the scene of the accident to a private garage and, some two and one-half hours later, one of the arresting officers drove to the garage and, without a search warrant or respondent's consent, conducted a thorough search of the car for the alleged purpose of finding respondent's service revolver which was not on respondent's person and had not been found during an initial search of the car at the scene of the accident. In the trunk of the car, the officer found and seized numerous items that eventually linked respondent to the death of one Herbert McKinney and

ultimately contributed to respondent's conviction for murder.

The Court begins its analysis by recognizing, as clearly it must, that the Fourth Amendment's prohibition against "unreasonable searches and seizures" is shaped by the warrant clause, and thus that a warrantless search of private property is per se "unreasonable" under the Fourth Amendment unless within one of the few specifically established and well-delineated exceptions. *Almeida-Sanchez* v. *United States, ante,* p. 266; *Katz* v. *United States,* 389 U. S. 347, 357 (1967); *Camara* v. *Municipal Court,* 387 U. S. 523, 528–529 (1967). At the same time, the Court also recognizes that one of the established exceptions to the warrant requirement is the search of an automobile on the highway where there is probable cause to support the search and "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll* v. *United States,* 267 U. S. 132, 153 (1925). See also *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971); *Chambers* v. *Maroney,* 399 U. S. 42 (1970); *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U. S. 216 (1968). But the search of the Thunderbird plainly cannot be sustained under the "automobile exception," for our prior decisions make it clear that where, as in this case, there is no reasonable likelihood that the automobile would or could be moved, the "automobile exception" is simply irrelevant. *Coolidge* v. *New Hampshire, supra,* at 461; *Carroll* v. *United States, supra,* at 156.

Another established exception to the warrant requirement is a search incident to a valid arrest. *Chimel* v. *California,* 395 U. S. 752 (1969). But the search of the Thunderbird cannot be sustained under this exception, because even assuming that such a search would have been within the permissible scope of a search incident to

an arrest for drunken driving, it is clear that under *Preston* v. *United States,* 376 U. S. 364, 368 (1964), "the search was too remote in time or place to have been made as incidental to the arrest."

A third exception to the warrant requirement is the seizure of evidence in "plain view." Thus, in *Harris* v. *United States,* 390 U. S. 234 (1968), we upheld the seizure of an automobile registration card that fell within plain view of a police officer as he opened the door of an impounded automobile to roll up the windows. But, as we cautioned in *Coolidge, supra,* at 466, "[w]hat the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." In *Harris,* the prior justification for the intrusion by the police was to roll up the windows and lock the doors "to protect the car while it was in police custody." 390 U. S., at 236. "[T]he discovery of the card was not the result of a search," we said, and "in these narrow circumstances" the "plain view" exception to the warrant requirement was fully applicable. In the present case, however, the sole purpose for the initial intrusion into the vehicle was to *search* for the gun. Thus, the seizure of the evidence from the trunk of the car can be sustained under the "plain view" doctrine only if the search for the gun was itself constitutional. Reliance on the "plain view" doctrine in this case is therefore misplaced since the antecedent search cannot be sustained.

Another exception to the warrant requirement is that which sustains a search in connection with the seizure of an automobile for purposes of forfeiture proceedings. In *Cooper* v. *California,* 386 U. S. 58 (1967), the Court upheld the warrantless search of an automobile after it had been lawfully impounded pursuant to a California statute mandating the seizure and forfeiture of any

vehicle used to facilitate the possession or transportation of narcotics. There, however, the police were authorized to treat the car in their custody as if it were their own, and the search was sustainable as an integral part of their right of retention. This case, of course, is poles away from *Cooper*. The Thunderbird was not subject to forfeiture proceedings. On the contrary, ownership of the car remained exclusively in respondent's lessor and the sole reason that the police took even temporary possession of the car was to remove it from the highway until respondent could claim it.

Clearly, therefore, the Court's decision today finds no support in any of the established exceptions. The police knew what they were looking for and had ample opportunity to obtain a warrant. Under those circumstances, our prior decisions make it clear that the Fourth Amendment required the police to obtain a warrant prior to the search. *Carroll* v. *United States, supra,* at 156. Thus, despite the Court's asserted adherence to the principles of our prior decisions, in fact the decision rests on a subjective view of what is deemed acceptable in the way of investigative functions performed by rural police officers. But the applicability of the Fourth Amendment cannot turn on fine-line distinctions between criminal and investigative functions. On the contrary, "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior," *Camara* v. *Municipal Court, supra,* at 530, for "[t]he basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Id.,* at 528. Thus, the fact that the professed purpose of the contested search was to protect the public safety rather than to gain incriminating evi-

dence does not of itself eliminate the necessity for compliance with the warrant requirement. Although a valid public interest may establish probable cause to search, *Camara, supra,* and *See* v. *City of Seattle,* 387 U. S. 541 (1967), make clear that, absent exigent circumstances, the search must be conducted pursuant to a "suitably restricted search warrant." *Camara, supra,* at 539. See also *Almeida-Sanchez* v. *United States, supra.* And certainly there were no exigent circumstances to justify the warrantless search made of the Thunderbird. For even assuming that the officer had reason to believe that respondent's service revolver was in the Thunderbird, the police had left the car in the custody of a private garage and did not return to look for the gun until two and one-half hours later. Moreover, although the arresting officers were at all times aware that respondent was an off-duty Chicago policeman, the officers never once inquired of respondent as to whether he was carrying a gun and, if so, where it was located. I can only conclude, therefore, that what the Court does today in the name of an investigative automobile search is in fact a serious departure from established Fourth Amendment principles. And since in my view that departure is totally unjustified, I would affirm the judgment of the Court of Appeals invalidating the search of the Thunderbird and remand the case to the District Court for determination whether the evidence seized during the search of the Dodge and the farm was the fruit of the unlawful search of the Thunderbird. See *Alderman* v. *United States,* 394 U. S. 165 (1969); *Wong Sun* v. *United States,* 371 U. S. 471 (1963).

Syllabus

NORWOOD ET AL. *v.* HARRISON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI

No. 72–77. Argued February 20–21, 1973—Decided June 25, 1973

A three-judge District Court sustained the validity of a Mississippi statutory program, begun in 1940, under which textbooks are purchased by the State and lent to students in both public and private schools, without reference to whether any participating private school has racially discriminatory policies. The number of private secular schools in Mississippi, with a virtually all-white student population, has greatly increased in recent years. *Held:*

1. Private schools have the right to exist and to operate, *Pierce* v. *Society of Sisters,* 268 U. S. 510, but the State is not required by the Equal Protection Clause to provide assistance to private schools equivalent to that it provides to public schools without regard to whether the private schools discriminate on racial grounds. Pp. 461–463.

2. Free textbooks, like tuition grants directed to students in private schools, are a form of tangible financial assistance benefiting the schools themselves, and the State's constitutional obligation requires it to avoid not only operating the old dual system of racially segregated schools but also providing tangible aid to schools that practice racial or other invidious discrimination. Pp. 463–468.

3. Assistance carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests may be confined to the secular functions of sectarian schools and does not substantially promote the religious mission of those schools in violation of the Establishment Clause. In this case, however, the legitimate educational function of private discriminatory schools cannot be isolated from their alleged discriminatory practices; discriminatory treatment exerts a pervasive influence on the entire educational process. *Brown* v. *Board of Education,* 347 U. S. 483. The Establishment Clause permits a greater degree of state assistance to sectarian schools than may be given to private schools which engage in discriminatory practices. *Everson* v. *Board of Education,* 330 U. S. 1, and *Board of Education* v. *Allen,* 392 U. S. 236, distinguished. Pp. 468–470.

4. Proper injunctive relief can be granted without implying that all the private schools alleged to be receiving textbook aid have restrictive admission policies. The District Court can direct appellees to submit for approval a certification procedure whereby schools may apply for textbooks on behalf of pupils, affirmatively declaring admission policies and practices, and stating the number of their racially and religiously identifiable minority students, and other relevant data. Certification of eligibility will be subject to judicial review. Pp. 470–471.

340 F. Supp. 1003, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS and BRENNAN, JJ., concurred in the result.

Melvyn R. Leventhal argued the cause for appellants. With him on the briefs were *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Norman J. Chachkin,* and *Anthony G. Amsterdam.*

William A. Allain, First Assistant Attorney General of Mississippi, argued the cause for appellees. With him on the brief were *A. F. Summer,* Attorney General, and *Heber Ladner, Jr.,* Special Assistant Attorney General.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

A three-judge District Court sustained the validity of a Mississippi statutory program under which textbooks are purchased by the State and lent to students in both public and private schools, without reference to whether any participating private school has racially discriminatory policies. 340 F. Supp. 1003 (ND Miss. 1972). We noted probable jurisdiction, 409 U. S. 839.

**Solicitor General Griswold, Assistant Attorney General Pottinger, Deputy Solicitor General Wallace, Harriet S. Shapiro, Brian K. Landsberg,* and *Thomas M. Keeling* filed a memorandum for the United States as *amicus curiae* urging reversal.

I

Appellants, who are parents of four schoolchildren in Tunica County, Mississippi, filed a class action on behalf of students throughout Mississippi to enjoin in part the enforcement of the Mississippi textbook lending program. The complaint alleged that certain of the private schools excluded students on the basis of race and that, by supplying textbooks to students attending such private schools, appellees, acting for the State, have provided direct state aid to racially segregated education. It was also alleged that the textbook aid program thereby impeded the process of fully desegregating public schools, in violation of appellants' constitutional rights.

Private schools in Mississippi have experienced a marked growth in recent years. As recently as the 1963–1964 school year, there were only 17 private schools other than Catholic schools; the total enrollment was 2,362 students. In these nonpublic schools 916 students were Negro, and 192 of these were enrolled in special schools for retarded, orphaned, or abandoned children.[1] By September 1970, the number of private non-Catholic schools had increased to 155 with a student population estimated at 42,000, virtually all white. Appellees do not challenge the statement, which is fully documented in appellants' brief, that "the creation and enlargement of these [private] academies occurred simultaneously with major events in the desegregation of public schools . . . ."[2]

This case does not raise any question as to the right of citizens to maintain private schools with admission limited to students of particular national origins, race, or religion or of the authority of a State to allow such

[1] App. 40–41.

[2] Brief for Appellants 8–9.

schools. See *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925). The narrow issue before us, rather, is a particular form of tangible assistance the State provides to students in private schools in common with all other students by lending textbooks under the State's 33-year-old program for providing free textbooks to all the children of the State. The program dates back to a 1940 appeal for improved educational facilities by the Governor of Mississippi to the state legislature. The legislature then established a state textbook purchasing board and authorized it to select, purchase, and distribute free textbooks for all schoolchildren through the first eight grades.[3] In 1942, the program was extended to cover all high school students, and, as codified, the statutory authorization remains substantially unchanged. Miss. Code Ann. § 6634 *et seq.* (1942).

Administration of the textbook program is vested in the Mississippi Textbook Purchasing Board, whose members include the Governor, the State Superintendent of Education, and three experienced educators appointed by the Governor for four-year terms. *Id.,* §§ 6634, 6641. The Board employs a full-time administrator as its Executive Secretary. Textbooks may be purchased only "for use in those courses set up in the state course of study adopted by the State Board of Education, or courses established by special acts of the Legislature." *Id.,* § 6646. For each course of study, there is a "rating committee" composed of appointed members, *id.,* § 6641 (1)(d), and only those books approved by the relevant rating committee may be purchased from publishers at a price which cannot "be higher than the lowest prices at which the same books are being sold anywhere in the United States." *Id.,* § 6646 (1).

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[3] See *Norwood* v. *Harrison,* 340 F. Supp. 1003, 1007 (ND Miss. 1972).

The books are kept at a central book repository in Jackson. *Id.*, § 6641 (1)(f). Appellees send to each school district, and, in recent years, to each private school [4] requisition forms listing approved textbooks available from the State for free distribution to students. The local school district or the private school sends a requisition form to the Purchasing Board for approval by the Executive Secretary, who in turn forwards the approved form to the Jackson book repository where the order is routinely filled and the requested books shipped directly to the school district or the private school.

The District Court found that "34,000 students are presently receiving state-owned textbooks while attending 107 all-white, nonsectarian private schools which have been formed throughout the state since the incep-

[4] The regulation for distribution of state-owned textbooks from 1940 through 1970 provided as follows:

"For the distribution of free textbooks the local control will be placed in the hands of the County Superintendent of Education. All requisitions for books shall be made through him and all shipments of books shall be invoiced through him. At his discretion he may set up certain regulations governing the distribution of books within the county, such regulations not to conflict with the regulations adopted by the State Textbook Board or provisions of the Free Textbook Act."

This regulation was revised on October 14, 1970, to read as follows:

"*Public Schools.* The administration of the textbook program in the public schools shall be the responsibility of the administrative heads of the county units, consolidated districts, and municipal separate districts set up by the Legislature. All textbook transactions between the public schools and the State shall be carried on through them. It shall be the duty of these local custodians to render all reports required by the State; to place orders for textbooks for the pupils in their schools . . . .

"*Private Schools.* Private and parochial school programs shall be the responsibility of the State Textbook Board. All textbook transactions will be carried out between the Board and the administrative heads of these schools. Their duties shall be the same as outlined above for public schools."

tion of public school desegregation." 340 F. Supp., at 1011.[5] During the 1970–1971 school year, these schools held 173,424 books, for which Mississippi paid $490,239. The annual expenditure for replacements or new texts is approximately $6 per pupil, or a total of approximately $207,000 for the students enrolled in the participating private segregated academies, exclusive of mailing costs which are borne by the State as well.

In dismissing the complaint the District Court stressed, first, that the statutory scheme was not motivated by a desire to further racial segregation in the public schools, having been enacted first in 1940, long before this Court's decision in *Brown* v. *Board of Education,* 347 U. S. 483 (1954), and consequently, long before there was any occasion to have a policy or reason to foster the development of racially segregated private academies. Second, the District Court took note that providing textbooks to private *sectarian* schools had been approved by this Court in *Board of Education* v. *Allen,* 392 U. S. 236 (1968), and that "[t]he essential inquiry, therefore, is whether we should apply a more stringent standard for determining what constitutes state aid to a school in the context of the Fourteenth Amendment's ban against denial of the equal protection of the law than the Supreme Court has applied in First Amendment cases." 340 F. Supp., at 1011. The District Court held no more stringent standard should apply on the facts of this case, since, as in *Allen,* the books were provided to the students and not to the schools. Finally, the District Court concluded that the textbook loans did not interfere with or impede the State's acknowledged duty to establish a unitary

[5] The variation in the figures as to schools and students is accounted for by the District Court's omission of particular kinds of schools in making the findings. The earlier and higher figures are found in the briefs and are not disputed.

school system under this Court's holding in *Green* v. *County School Board,* 391 U. S. 430, 437 (1968), since

> "[d]epriving any segment of school children of state-owned textbooks at this point in time is not necessary for the establishment or maintenance of state-wide unitary schools. Indeed, the public schools which plaintiffs acknowledge were fully established as unitary schools throughout the state no later than 1970–71, continue to attract 90% of the state's educable children. There is no showing that any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools." 340 F. Supp., at 1013.

II

In *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), the Court held that a State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice. In the 1971 Term we reaffirmed the vitality of *Pierce,* in *Wisconsin* v. *Yoder,* 406 U. S. 205, 213 (1972), and there has been no suggestion in the present case that we alter our view of *Pierce.* Yet the Court's holding in *Pierce* is not without limits. As MR. JUSTICE WHITE observed in his concurring opinion in *Yoder, Pierce* "held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools." *Id.,* at 239.

Appellees fail to recognize the limited scope of *Pierce* when they urge that the right of parents to send their children to private schools under that holding is at stake in this case. The suggestion is made that the rights of parents under *Pierce* would be undermined were the lending of free textbooks denied to those who attend private

schools—in other words, that schoolchildren who attend private schools might be deprived of the equal protection of the laws were they invidiously classified under the state textbook loan program simply because their parents had exercised the constitutionally protected choice to send the children to private schools.

We do not see the issue in appellees' terms. In *Pierce,* the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.

The appellees intimate that the State *must* provide assistance to private schools equivalent to that which it provides to public schools without regard to whether the private schools discriminate on racial grounds. Clearly, the State need not. Even as to church-sponsored schools whose policies are nondiscriminatory, any absolute right to equal aid was negated, at least by implication, in *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971). The Religion Clauses of the First Amendment strictly confine state aid to sectarian education. Even assuming, therefore, that the Equal Protection Clause might require state aid to be granted to private nonsectarian schools in some circumstances—health care or textbooks, for example—a State could rationally conclude as a matter of legislative policy that constitutional neutrality as to sectarian schools might best be achieved by withholding all state assistance. See *San Antonio Independent School District* v. *Rodriguez,* 411 U. S. 1 (1973). In the same way, a

State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-supported discrimination. That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.

III

The District Court's holding therefore raises the question whether and on what terms a State may—as a matter of legislative policy—provide tangible assistance to students attending private schools. Appellants assert, not only that the private schools are in fact racially discriminatory, but also that aid to them in any form is in derogation of the State's obligation not to support discrimination in education.

This Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools.[6] A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases. Free textbooks, like tuition grants directed to private school

[6] *Brown* v. *South Carolina Board of Education*, 296 F. Supp. 199 (SC), aff'd *per curiam*, 393 U. S. 222 (1968); *Poindexter* v. *Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833 (ED La. 1967), aff'd *per curiam*, 389 U. S. 571 (1968). See *Wallace* v. *United States*, 389 U. S. 215 (1967), aff'g *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 475 (MD Ala.). Mississippi's tuition grant programs were invalidated in *Coffey* v. *State Educational Finance Comm'n*, 296 F. Supp. 1389 (SD Miss. 1969); *Coffey* v. *State Educational Finance Comm'n*, SD Miss., CA No. 2906, decided Sept. 2, 1970 (unreported). The latter case involved a statute which provided for tuition loans rather than tuition grants. See *Green* v. *Connally*, 330 F. Supp. 1150 (DC), aff'd *sub nom. Coit* v. *Green*, 404 U. S. 997 (1971).

students, are a form of financial assistance inuring to the benefit of the private schools themselves.[7] An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the

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[7] Appellees misperceive the "child benefit" theory of our cases decided under the Religion Clauses of the First Amendment. See, *e. g.*, *Cochran* v. *Louisiana Board of Education*, 281 U. S. 370 (1930), and *Board of Education* v. *Allen*, 392 U. S. 236 (1968). In those cases the Court observed that the direct financial benefit of textbook loans to students is "to parents and children, not to schools," *id.*, at 244, in the sense that parents and children—not schools—would in most instances be required to procure their textbooks if the State did not. But the Court has never denied that "free books make it more likely that some children choose to attend a sectarian school," *ibid.*, just as in other cases involving aid to sectarian schools we have acknowledged that the various forms of state assistance "surely aid these [religious] institutions . . . in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services." *Tilton* v. *Richardson*, 403 U. S. 672, 679 (1971). Plainly, religion benefits indirectly from governmental aid to parents and children; nevertheless, "[t]hat religion may indirectly benefit from governmental aid . . . does not convert that aid into an impermissible establishment of religion." *Lemon* v. *Kurtzman*, 403 U. S. 602, 664 (1971) (opinion of WHITE, J.).

The leeway for indirect aid to sectarian schools has no place in defining the permissible scope of state aid to private racially discriminatory schools. "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper* v. *Aaron*, 358 U. S. 1, 19 (1958). Thus MR. JUSTICE WHITE, the author of the Court's opinion in *Allen*, *supra*, and a dissenter in *Lemon* v. *Kurtzman*, *supra*, noted there that in his view, legislation providing assistance to any sectarian school which restricted entry on racial or religious grounds would, to that extent, be unconstitutional. *Lemon*, *supra*, at 671 n. 2. See Part IV, *infra*.

form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458, 475–476 (MD Ala. 1967).

We do not suggest that a State violates its constitutional duty merely because it has provided *any* form of state service that benefits private schools said to be racially discriminatory. Textbooks are a basic educational tool and, like tuition grants, they are provided only in connection with schools; they are to be distinguished from generalized services government might provide to schools in common with others. Moreover, the textbooks provided to private school students by the State in this case are a form of assistance readily available from sources entirely independent of the State—unlike, for example, "such necessities of life as electricity, water, and police and fire protection." *Moose Lodge No. 107* v. *Irvis,* 407 U. S. 163, 173 (1972). The State has neither an absolute nor operating monopoly on the procurement of school textbooks; anyone can purchase them on the open market.

The District Court laid great stress on the absence of a showing by appellants that "any child enrolled in private school, if deprived of free textbooks, would withdraw from private school and subsequently enroll in the public schools." 340 F. Supp., at 1013. We can accept this factual assertion; we cannot and do not know, on this record at least, whether state textbook assistance is the determinative factor in the enrollment of any students in any of the private schools in Mississippi. We do not agree with the District Court in its analysis of the legal consequences of this uncertainty, for the Constitution

does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination. "[D]ecisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 percent or adds up to only 49 per cent of the support of the segregated institution." *Poindexter* v. *Louisiana Financial Assistance Comm'n,* 275 F. Supp. 833, 854 (ED La. 1967).[8]

The recurring theme of appellees' argument is a sympathetic one—that the State's textbook loan program is extended to students who attend racially segregated private schools only because the State sincerely wishes to foster quality education for all Mississippi children, and, to that end, has taken steps to insure that no sub-group of schoolchildren will be deprived of an important educational tool merely because their parents have chosen to enroll them in segregated private schools. We need not assume that the State's textbook aid to private schools has been motivated by other than a sincere interest in the educational welfare of all Mississippi children. But good intentions as to one valid objective do not serve to negate the State's involvement in violation of a constitutional duty. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect." *Wright* v. *Council of City of Emporia,* 407 U. S. 451, 462 (1972). The Equal Protection Clause would

[8] Accord, *Griffin* v. *State Board of Education,* 296 F. Supp. 1178, 1181 (ED Va. 1969), superseding *Griffin* v. *State Board of Education,* 239 F. Supp. 560 (ED Va. 1965); *Brown* v. *South Carolina Board of Education, supra.*

be a sterile promise if state involvement in possible private activity could be shielded altogether from constitutional scrutiny simply because its ultimate end was not discrimination but some higher goal.

The District Court offered as further support for its holding the finding that Mississippi's public schools "were fully established as unitary schools throughout the state no later than 1970–71 [and] continue to attract 90% of the state's educable children." 340 F. Supp., at 1013. We note, however, that overall statewide attendance figures do not fully and accurately reflect the impact of private schools in particular school districts.[9] In any event, the constitutional infirmity of the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which, under the District Court holding, may discriminate if they so desire. A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination.

[9] In Tunica County, for example, where appellants reside, in response to *Green* v. *Connally, supra,* and *Alexander* v. *Holmes County Board of Education,* 396 U. S. 19 (1969), all white children were withdrawn from public schools and placed in a private academy housed in local church facilities and staffed by the principal and 17 high school teachers of the county system, who resigned in mid-year to accept jobs at the new academy. See *United States* v. *Tunica County School District,* 323 F. Supp. 1019 (ND Miss. 1970), aff'd, 440 F. 2d 377 (CA5 1971). As of the time of the filing of this lawsuit, the successor Tunica Institute of Learning enrolled 495 students, all white, and would not attest to an open enrollment policy. Similar histories of Holmes County, Canton Municipal Separate School District, Jackson Municipal Separate School District, Amite County, Indianola Municipal Separate School District, and Grenada Municipal Separate School District are recited, without challenge by appellees, in Brief for Appellants 14–19.

That the State's public schools are now fully unitary, as the District Court found, is irrelevant.

IV

Appellees and the District Court also placed great reliance on our decisions in *Everson* v. *Board of Education*, 330 U. S. 1 (1947), and *Board of Education* v. *Allen*, 392 U. S. 236 (1968). In *Everson*, we held that the Establishment Clause of the First Amendment did not prohibit New Jersey from "spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools." 330 U. S., at 17. *Allen*, following *Everson*, sustained a New York law requiring school textbooks to be lent free of charge to all students, including those in attendance at parochial schools, in specified grades.

Neither *Allen* nor *Everson* is dispositive of the issue before us in this case. Religious schools "pursue two goals, religious instruction and secular education." *Board of Education* v. *Allen*, *supra*, at 245. And, where carefully limited so as to avoid the prohibitions of the "effect" and "entanglement" tests, States may assist church-related schools in performing their secular functions, *Committee for Public Education* v. *Nyquist*, *post*, at 774, 775; *Levitt* v. *Committee for Public Education*, *post*, at 481, not only because the States have a substantial interest in the quality of education being provided by private schools, see *Cochran* v. *Louisiana Board of Education*, 281 U. S. 370, 375 (1930), but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others.

Like a sectarian school, a private school—even one

that discriminates—fulfills an important educational function; however, the difference is that in the context of this case the legitimate educational function cannot be isolated from discriminatory practices—if such in fact exist. Under *Brown* v. *Board of Education,* 347 U. S. 483 (1954), discriminatory treatment exerts a pervasive influence on the entire educational process. The private school that closes its doors to defined groups of students on the basis of constitutionally suspect criteria manifests, by its own actions, that its educational processes are based on private belief that segregation is desirable in education. There is no reason to discriminate against students for reasons wholly unrelated to individual merit unless the artificial barriers are considered an essential part of the educational message to be communicated to the students who are admitted. Such private bias is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State.

Our decisions under the Establishment Clause reflect the "internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause," *Tilton* v. *Richardson,* 403 U. S. 672, 677 (1971). This does not mean, as we have already suggested, that a State is constitutionally obligated to provide even "neutral" services to sectarian schools. But the transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors.

In contrast, although the Constitution does not proscribe private bias, it places no value on discrimination as

it does on the values inherent in the Free Exercise Clause. Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts.[10] However narrow may be the channel of permissible state aid to sectarian schools, *Nyquist, supra; Levitt, supra,* it permits a greater degree of state assistance than may be given to private schools which engage in discriminatory practices that would be unlawful in a public school system.

V

At oral argument, appellees expressed concern over the process of determining the scope of relief to be granted should appellants prevail on the merits. That aspect of the case presents problems but the procedural details need not be fully resolved here. The District Court's assumption that textbook loans were permissible, even to racially discriminating private schools, obviated any necessity for that court to determine whether some of the private schools could properly be classified as "racially discriminatory" and how that determination might best be made. We construe the complaint as contemplating an individual determination as to each private school in Mississippi whose students now receive text-

[10] See, *e. g., Griffin* v. *Breckenridge,* 403 U. S. 88 (1971); *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409 (1968); 42 U. S. C. § 2000a *et seq.* (barring discrimination in public accommodations); 42 U. S. C. § 2000e *et seq.* (barring discrimination in private employment); 42 U. S. C. § 3601 *et seq.* (barring discrimination in private housing transactions).

books under the State's textbook loan program; relief on an assumption that all private schools were discriminating, thus foreclosing individualized consideration, would not be appropriate.

The proper injunctive relief can be granted without implying a finding that all the private schools alleged to be receiving textbook aid are in fact practicing restrictive admission policies. Private schools are not fungible and the fact that some or even most may practice discrimination does not warrant blanket condemnation. The District Court can appropriately direct the appellees to submit for approval a certification procedure under which any school seeking textbooks for its pupils may apply for participation on behalf of pupils. The certification by the school to the Mississippi Textbook Purchasing Board should, among other factors, affirmatively declare its admission policies and practices, state the number of its racially and religiously identifiable minority students and such other relevant data as is consistent with this opinion. The State's certification of eligibility would, of course, be subject to judicial review.

This school-by-school determination may be cumbersome but no more so than the State's process of ascertaining compliance with educational standards. No presumptions flow from mere allegations; no one can be required, consistent with due process, to prove the absence of violation of law.

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concur in the result.

LEVITT, COMPTROLLER OF NEW YORK, ET AL. *v.* COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 72–269. Argued March 19, 1973—Decided June 25, 1973*

The New York Legislature appropriated $28,000,000 to reimburse nonpublic schools in the State "for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports . . . ." Tests and examinations, the most expensive of these mandated services, are of two kinds: (a) state-prepared tests, such as "Regents examinations" and "Pupil Evaluation Program Tests," and (b) traditional teacher-prepared tests, which constitute the overwhelming majority of tests in nonpublic schools. Qualifying schools receive annually, per pupil, $27 (grades one through six) and $45 (grades seven through 12), and are not required to account for the moneys received and how they are spent. While the Act states that it shall not be construed to authorize payments for religious worship or instruction, church-sponsored schools are eligible to receive payments thereunder. The three-judge District Court found the Act unconstitutional under the Establishment Clause and permanently enjoined its enforcement. The court rejected appellants' argument that payments are made only for "secular, neutral, or nonideological" services. The court held that the greatest portion of the funds is paid for the services of teachers in testing students and that testing is an integral part of the teaching process. The court dismissed as "fanciful" the contention that a State may reimburse church-related schools for costs incurred in performing any service "mandated" by state law. *Held:*

*Together with No. 72–270, *Anderson* v. *Committee for Public Education & Religious Liberty et al.*, and No. 72–271, *Cathedral Academy et al.* v. *Committee for Public Education & Religious Liberty et al.*, also on appeal from the same court.

1. The statute constitutes an impermissible aid to religion contravening the Establishment Clause, since no attempt is made and no means are available to assure that internally prepared tests, which are "an integral part of the teaching process," are free of religious instruction and avoid inculcating students in the religious precepts of the sponsoring church. *Committee for Public Education* v. *Nyquist, post,* p. 756. Pp. 479–481.

2. The inquiry is not whether the State should be permitted to pay for any "mandated" activity, but whether the challenged state aid has the primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the affairs of the religious institution. Pp. 481–482.

3. The Act provides only for a single per-pupil allotment for a variety of services, some secular and some potentially religious, and the courts cannot properly reduce that allotment to correspond to the actual costs of performing reimbursable secular services, as that is a legislative and not a judicial function. P. 482.

342 F. Supp. 439, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, BRENNAN, and MARSHALL, JJ., filed a separate statement, *post,* p. 482. WHITE, J., dissented.

Jean M. Coon, Assistant Solicitor General of New York, argued the cause for appellants in Nos. 72–269 and 72–270. With her on the brief for appellants in No. 72–269 were *Louis J. Lefkowitz,* Attorney General, and *Ruth Kessler Toch,* Solicitor General. *John F. Haggerty* and *Louis P. Contiguglia* were on the briefs for appellant in No. 72–270. *Porter R. Chandler* argued the cause for appellants in No. 72–271. With him on the briefs was *Richard E. Nolan.* *Nathan Lewin* and *Julius Berman* were on the brief for appellants Bais Yaakov Academy for Girls et al. in No. 72–271.

Leo Pfeffer argued the cause and filed a brief for appellees.†

†*Ethan A. Hitchcock* filed a brief for New York State Association of Independent Schools as *amicus curiae* urging reversal.

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We are asked to decide whether Chapter 138 of New York State's Laws of 1970, under which the State reimburses private schools throughout the State for certain costs of testing and recordkeeping, violates the Establishment Clause of the First Amendment. A three-judge District Court, with one judge dissenting, held the Act unconstitutional. 342 F. Supp. 439 (SDNY 1972). We noted probable jurisdiction. 409 U. S. 977.

I

In April 1970, the New York Legislature appropriated $28,000,000 for the purpose of reimbursing nonpublic schools throughout the State

> "for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation." [1] New York Laws 1970, c. 138, § 2.

As indicated by the portion of the statute quoted above, the State has in essence sought to reimburse private schools for performing various "services" which the State "mandates." Of these mandated services, by far the most expensive for nonpublic schools is the "administration, grading and the compiling and reporting of the

[1] N. Y. Educ. Law § 305 charges the Commissioner of Education with the duty of maintaining general supervision over all schools throughout the State and with making sure that each school is "examined and inspected."

results of tests and examinations." Such "tests and examinations" appear to be of two kinds: (a) state-prepared examinations, such as the "Regents examinations" and the "Pupil Evaluation Program Tests," [2] and (b) traditional teacher-prepared tests, which are drafted by the nonpublic school teachers for the purpose of measuring the pupils' progress in subjects required to be taught under state law.[3] The overwhelming majority

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[2] The Regents' examinations are described by appellants Levitt and Nyquist as "state-wide tests of subject matter achievement." The pupil evaluation program tests, the so-called "PEP Tests," are also administered throughout the State in grades three, six, and nine.

[3] The District Court indicated that there was some doubt as to whether teacher-prepared tests are within the scope of the Act. The uncertainty was due to one of appellant Nyquist's answers to appellees' interrogatories, which stated that "only the Regents Scholarship and January and June Regents Examinations might be regarded as *specifically mandated.*" 342 F. Supp. 439, 441 (emphasis in original interrogatory). The District Court, however, found it unnecessary to resolve this factual ambiguity, stating: "While our decision as to the constitutionality of the statute does not turn on the factual question so presented, we mention it to illustrate the lack of certainty as to the purposes for which the moneys received are actually used, or, indeed, whether they can be regarded as specifically 'mandated.'" *Ibid.*

In this Court, appellants have insisted that since teacher-prepared examinations are required by state regulation they are included within the services reimbursed under the Act. In support of the former proposition, the appellants cite § 176.1 (b) of the Regulations of the Commissioner of Education, which provides that all nonpublic schools "shall conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner." 8 N. Y. C. R. R. § 176.1 (b).

Appellees do not contest the validity of appellants' construction of the Act, and we accept it for the purposes of this litigation.

of testing in nonpublic, as well as public, schools is of the latter variety.

Church-sponsored as well as secular nonpublic schools are eligible to receive payments under the Act. The District Court made findings that the Commissioner of Education had "construed and applied" the Act "to include as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach." 342 F. Supp., at 440–441.

A school seeking aid under the Act is required to submit an application to the Commissioner of Education, who may direct the applicant to file "such additional reports" as he deems necessary to make a determination of eligibility. New York Laws 1970, c. 138, § 4. Qualifying schools receive an annual payment of $27 for each pupil in average daily attendance in grades one through six and $45 for each pupil in average daily attendance in grades seven through 12.[4] Payments are made in

[4] Exactly how the $27 and $45 figures were arrived at is somewhat unclear. Appellant Nyquist, in his answer to appellees' interrogatories in the court below, gave the following explanation:

"That prior to the enactment of Chapter 138 of the Laws of 1970, a conference was held in which representatives of the Office of the Counsel to the Governor, of the Division of the Budget in the Executive Department and of the State Education Department participated; that at said conference the representatives of the State Education Department were asked whether the dollar amount in

two installments: Between January 15 and March 15 of the school year, one-half of the "estimated total apportionment" is paid directly to the school; the balance is paid between April 15 and June 15. The Commissioner is empowered to make "later payments for the purpose of adjusting and correcting apportionments." *Id.*, § 5.

Section 8 of the Act states: "Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction." However, the Act contains no provision authorizing state audits of school financial records to determine whether a school's actual costs in complying with the mandated services are less than the annual lump sum payment. Nor does the Act require a school to return to the State moneys received in excess of its actual expenses.[5] In appellant Nyquist's answers to appellees' interrogatories, which the parties stipulated could be "taken as accepted facts for the purposes of this case," the Commissioner stated that "qualifying schools are not

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question was reasonable and that the answer was that to the best of their judgment the amount was reasonable; that no record of the said conference was made."

[5] Subsequent to the enactment of Chapter 138, the state conducted several studies to determine whether the per-pupil allotment under the statute exceeded the actual costs to schools in performing the mandated services. The District Court found the results "cloudy":

"If such items as 'teacher examinations' and 'entrance examinations' are included in the list of 'mandated services,' it appears that the schools' expenses are at least as great as the amounts they receive from the state. But if those items are excluded, the amounts received from the state are substantially greater than the schools' expenses." 342 F. Supp., at 441.

As noted above, the court did not resolve the question whether payments under the Act were intended to compensate schools for internal testing. See n. 3, *supra*.

required to submit reports accounting for the moneys received and how they are expended."

II

Appellees are New York taxpayers and an unincorporated association. They filed this suit in the United States District Court claiming that Chapter 138 abridges the Establishment Clause of the First Amendment. An injunction was sought enjoining appellants Levitt and Nyquist, the State Comptroller and Commissioner of Education respectively, from enforcing the Act. State Senator Earl W. Brydges and certain Catholic and Jewish parochial schools qualified to receive aid under the Act were permitted to intervene as parties defendant.

A three-judge District Court was convened pursuant to 28 U. S. C. §§ 2281, 2284. After a hearing on the merits, a majority of the District Court permanently enjoined appellants from enforcement of the Act. The District Court concluded that this case was controlled by our decision in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), and held the Act unconstitutional under the Establishment Clause.

In reaching its decision, the District Court rejected appellants' argument that the Act is constitutional because payments are made only for services that are "secular, neutral, or nonideological" in character. *Id.*, at 616. The court stated:

> "By far the greatest portion of the funds appropriated under Chapter 138 is paid for the services of teachers in testing students, and testing is an integral part of the teaching process." 342 F. Supp., at 444.

Likewise, the court dismissed as "fanciful" the contention that a State may reimburse church-related schools for costs incurred in performing any service "mandated" by state law.

III

In *Committee for Public Education & Religious Liberty* v. *Nyquist, post,* p. 756, the Court has today struck down a provision of New York law authorizing "direct money grants from the State to 'qualifying' nonpublic schools to be used for the 'maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils.' " *Id.,* at 762 (footnote omitted).[6] The infirmity of the statute in *Nyquist* lay in its undifferentiated treatment of the maintenance and repair of facilities devoted to religious and secular functions of recipient, sectarian schools. Since "[n]o attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes," the Court held that the statute has the primary effect of advancing religion and is, therefore, violative of the Establishment Clause. *Id.,* at 774.

The statute now before us, as written and as applied by the Commissioner of Education, contains some of the same constitutional flaws that led the Court to its decision in *Nyquist.*[7] As noted previously, Chapter 138

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[6] The Court's holding as to grants of public funds for "maintenance and repair of . . . school facilities and equipment . . ." is sufficient authority to support affirmance of the District Court holding in this case. The author of this opinion joined that part of the Court's holding in *Nyquist, supra,* while dissenting from the holding that tuition grants and tax credits to parents are unconstitutional, and is, of course, bound by all parts of the judgment.

[7] We do not doubt that the New York Legislature had a "secular legislative purpose" in enacting Chapter 138. See *Epperson* v. *Arkansas,* 393 U. S. 97 (1968). The first section of the Act provides that the State has a "primary responsibility" to assure that its youth receive an adequate education; that the State has the "duty and authority" to examine and inspect all schools within its borders to make sure that adequate educational opportunities are being pro-

provides for a direct money grant to sectarian schools for performance of various "services." Among those services is the maintenance of a regular program of traditional internal testing designed to measure pupil achievement. Yet, despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction.

We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church. We do not "assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment." *Lemon* v. *Kurtzman*, 403 U. S., at 618. But the potential for conflict "inheres in the situation," and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination. See *id.*, at 617, 619. Since the State has failed to do so here, we are left with no choice under *Nyquist* but to hold that Chapter 138 constitutes an impermissible aid to religion; this is so because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities.

In the District Court and in this Court appellants insisted that payments under Chapter 138 do not aid the religious mission of church-related schools but merely provide partial reimbursement for totally nonsectarian activities performed at the behest of the State. Ap-

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vided; and that the State has a legitimate interest in assisting those schools insofar as they aid the State in fulfilling its responsibility.

pellants, in other words, contend that this case is controlled by our decisions in *Everson* v. *Board of Education,* 330 U. S. 1 (1947), and *Board of Education* v. *Allen,* 392 U. S. 236 (1968). In *Everson* we held that New Jersey could reimburse parents of parochial school children for expenses incurred in transporting the children on buses to their schools. And in *Allen* we upheld a New York statute requiring local school boards to lend secular textbooks "to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law." *Id.,* at 239.

In this case, however, we are faced with state-supported activities of a substantially different character from bus rides or state-provided textbooks. Routine teacher-prepared tests, as noted by the District Court, are "an integral part of the teaching process." 342 F. Supp., at 444. And, "[i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not." *Lemon* v. *Kurtzman,* 403 U. S., at 617.

To the extent that appellants argue that the State should be permitted to pay for any activity "mandated" by state law or regulation, we must reject the contention. State or local law might, for example, "mandate" minimum lighting or sanitary facilities for all school buildings, but such commands would not authorize a State to provide support for those facilities in church-sponsored schools. The essential inquiry in each case, as expressed in our prior decisions, is whether the challenged state aid has the primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the affairs of the religious institution. *Committee for Public Education & Re-*

ligious Liberty v. *Nyquist, supra,* at 772–773; *Kurtzman, supra,* at 612–613. That inquiry would be irreversibly frustrated if the Establishment Clause were read as permitting a State to pay for whatever it requires a private school to do.

We hold that the lump-sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial, function.

Accordingly, the judgment of the District Court is affirmed.

MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL are of the view that affirmance is compelled by our decision today in *Committee for Public Education & Religious Liberty* v. *Nyquist, post,* p. 756, and *Sloan* v. *Lemon, post,* p. 825.

MR. JUSTICE WHITE dissents.

HELLER *v.* NEW YORK

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 71–1043. Argued November 14, 1972—Decided June 25, 1973

Petitioner was manager of a movie theater where a sexually explicit film was exhibited. After police officers saw part of the film, an assistant district attorney requested a New York Criminal Court judge to view it. Upon seeing the entire performance, the judge signed warrants for seizure of the film and for petitioner's arrest on the ground that the film was obscene. Exhibition of an obscene film violates New York Penal Law § 235.05. No pretrial motion was made for return of the single film copy seized or for its suppression as evidence. There was no showing below that the seizure prevented exhibition of the film by use of another copy, and the record does not indicate whether another copy was available. Petitioner's trial was held 47 days after his arrest and the film seizure, and he was convicted. He argued that seizure of the film without a prior adversary hearing violated the Fourteenth Amendment. He also challenged his conviction on substantive grounds, arguing that he was convicted under standards of obscenity both overbroad and unconstitutionally vague, and that films shown only to consenting adults in private are constitutionally protected. The New York Court of Appeals affirmed his conviction, holding that an adversary hearing prior to seizure of the film was not required and that an *ex parte* warrant, issued after a judicial determination of obscenity, was constitutionally sufficient. *Held:*

1. Where a film is seized for the bona fide purpose of preserving it as evidence in a criminal proceeding, and it is seized pursuant to a warrant issued after a determination of probable obscenity by a neutral magistrate, and following the seizure a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. On a showing to the trial court that other copies of the film are not available for exhibition, the court should permit the seized film to be copied so that exhibition can be continued pending judicial resolution of the obscenity issue in an adversary proceeding. Otherwise, the film must be re-

turned. With such safeguards, a preseizure adversary hearing is not mandated by the First Amendment. Pp. 488–493.

2. The case is remanded to afford the state courts an opportunity to reconsider petitioner's substantive challenges in light of *Miller* v. *California*, *ante*, p. 15, and *Paris Adult Theatre I* v. *Slaton*, *ante*, p. 49, which establish guidelines for the lawful state regulation of obscene material. P. 494.

29 N. Y. 2d 319, 277 N. E. 2d 651, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 494. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post*, p. 494.

Irving Anolik argued the cause and filed a brief for petitioner.

Lewis R. Friedman argued the cause for respondent. With him on the brief were *Frank S. Hogan* and *Michael R. Juviler*.*

MR. CHIEF JUSTICE BURGER delivered the opinion of of the Court.

We granted certiorari in this case to determine whether a judicial officer authorized to issue warrants, who has viewed a film and finds it to be obscene, can issue a constitutionally valid warrant for the film's seizure as evidence in a prosecution against the exhibitor, without first conducting an adversary hearing on the issue of probable obscenity.

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*Briefs of *amici curiae* urging affirmance were filed by *Evelle J. Younger*, Attorney General, *Edward A. Hinz, Jr.*, Chief Assistant Attorney General, *Doris H. Maier* and *Edward P. O'Brien*, Assistant Attorneys General, and *Robert R. Granucci* and *Clifford K. Thompson, Jr.*, Deputy Attorneys General, for the State of California; and by *Charles H. Keating, Jr., pro se*, *Richard M. Bertsch*, *James J. Clancy*, and *Albert S. Johnston III* for Charles H. Keating, Jr.

Petitioner was manager of a commercial movie theater in the Greenwich Village area of New York City. On July 29, 1969, a film called "Blue Movie" was exhibited there. The film depicts a nude couple engaged in ultimate sexual acts. Three police officers saw part of the film. Apparently on the basis of their observations, an assistant district attorney of New York County requested a judge of the New York Criminal Court to see a performance. On July 31, 1969, the judge, accompanied by a police inspector, purchased a ticket and saw the entire film. There were about 100 other persons in the audience. Neither the judge nor the police inspector recalled any signs restricting admission to adults.[1]

At the end of the film, the judge, without any discussions with the police inspector, signed a search warrant for the seizure of the film and three "John Doe" warrants for the arrest of the theater manager, the projectionist, and the ticket taker, respectively. No one at the theater was notified or consulted prior to the issuance of the warrants. The judge signed the warrants because "it was, and is my opinion that that film is obscene, and was obscene as I saw it then under the definition of obscene, that is [in] . . . section 235.00 of the Penal Law." Exhibition of an obscene film violates New York Penal Law § 235.05.[2]

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[1] The prosecution presented no evidence that juveniles were actually present in the theater.

[2] New York Penal Law § 235.05 reads in relevant part:

"A person is guilty of obscenity when, knowing its content and character, he:

"1. Promotes, or possesses with intent to promote, any obscene material; or

"2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

[*Footnote 2 continued on p. 486*]

The warrants were immediately executed by police officers. Three reels, composing a single copy of the film, were seized. Petitioner, the theater manager, was arrested, as were the projectionist and the ticket taker.[3] No pretrial motion was made for the return of the film or for its suppression as evidence. Nor did petitioner make a pretrial claim that seizure of the film prevented its exhibition by use of another copy, and the record does not conclusively indicate whether such a copy was available. On September 16, 1969, 47 days after his arrest and the seizure of the movie, petitioner came to trial, a jury having been waived, before three judges of the New York City Criminal Court.

"Obscenity is a class A misdemeanor."

The terms used in § 235.05 are defined by New York Penal Law § 235.00, which reads in relevant part:

"The following definitions are applicable to sections 235.05, 235.10 and 235.15:

"1. 'Obscene.' Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

"2. 'Material' means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

"3. 'Performance' means any play, motion picture, dance or other exhibition performed before an audience.

"4. 'Promote' means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same."

[3] The cases against the ticket taker and projectionist were dismissed on the motion of the prosecutor.

At trial, the prosecution's case rested almost solely on testimony concerning the arrests and the seizure of the film, together with the introduction into evidence of the seized film itself. The film was exhibited to the trial judges. The defense offered three "expert" witnesses: an author, a professor of sociology, and a newspaper writer. These witnesses testified that the film had social, literary, and artistic importance in illustrating "a growing and important point of view about sexual behavior" as well as providing observations "about the political and social situation in this country today. . . ." Petitioner testified that the theater's employees were instructed not to admit persons who appeared to be under 18 years of age, unless they "had identification" that they were 18. Petitioner also testified that there was a sign at the box office stating that "no one under 17 [would be] admitted." Both at the end of the prosecution's case and his own case, petitioner moved to dismiss the indictment on the ground that the seizure of the film, without a prior adversary hearing, violated the Fourteenth Amendment.

At the close of trial on September 17, 1969, petitioner was found guilty by all three judges of violating New York Penal Law § 235.05. On appeal, both the Supreme Court of the State of New York, Appellate Term, and the Court of Appeals of the State of New York viewed the film and affirmed petitioner's conviction. The Court of Appeals, relying on this Court's opinion in *Lee Art Theatre* v. *Virginia,* 392 U. S. 636, 637 (1968), held that an adversary hearing was not required prior to seizure of the film, and that the judicial determination which occurred prior to seizure in this case was constitutionally sufficient. In so holding, the Court of Appeals explicitly disapproved, as going "beyond any requirement imposed on State courts by the Supreme

Court," *Astro Cinema Corp.* v. *Mackell,* 422 F. 2d 293 (CA2 1970), and *Bethview Amusement Corp.* v. *Cahn,* 416 F. 2d 410 (CA2 1969), cert. denied, 397 U. S. 920 (1970), cases requiring an adversary hearing prior to any seizure of movie film. 29 N. Y. 2d 319, 323, 277 N. E. 2d 651, 653 (1971).

We affirm this holding of the Court of Appeals of the State of New York. This Court has never held, or even implied, that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized. See *Times Film Corp.* v. *Chicago,* 365 U. S. 43 (1961); *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436, 440–442 (1957). In particular, there is no such absolute right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution. In *Lee Art Theatre* v. *Virginia, supra,* the Court went so far as to suggest that it was an open question whether a judge need "have viewed the motion picture before issuing the warrant."[4] Here the judge viewed the entire film and, indeed, witnessed the alleged criminal act. It is not contested that the judge was a "neutral, detached magistrate," that he had a full opportunity for independent judi-

[4] "It is true that a judge may read a copy of a book in courtroom or chambers but not as easily arrange to see a motion picture there. However, we need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant. The procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity,' [*Marcus* v. *Search Warrant,* 367 U. S. 717], at 732, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression. See *Freedman* v. *Maryland,* 380 U. S. 51, 58–59." 392 U. S., at 637.

cial determination of probable cause prior to issuing the warrant, and that he was able to "focus searchingly on the question of obscenity." See *Marcus* v. *Search Warrant,* 367 U. S. 717, 731–733 (1961). Cf. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 449–453 (1971); *Giordenello* v. *United States,* 357 U. S. 480, 485–486 (1958); *Johnson* v. *United States,* 333 U. S. 10, 14–15 (1948).

In *United States* v. *Thirty-seven Photographs,* 402 U. S. 363 (1971), and *Freedman* v. *Maryland,* 380 U. S. 51 (1965), we held that " 'because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid *final restraint.*' " 402 U. S., at 367, quoting 380 U. S., at 58 (emphasis added). Those cases involved, respectively, seizure of imported materials by federal customs agents and state administrative licensing of motion pictures, both civil procedures directed at absolute suppression of the materials themselves. Even in those cases, we did not require that the adversary proceeding must take place prior to *initial* seizure. Rather, it was held that a judicial determination must occur "promptly so that administrative delay does not in itself become a form of censorship." [5] *United States* v. *Thirty-seven Photographs, supra,* at 367; *Freedman* v. *Maryland,*

[5] We further held "(1) there must be assurance, 'by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film'; (2) '[a]ny restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution'; and (3) 'the procedure must also assure a prompt final judicial decision' to minimize the impact of possibly erroneous administrative action. [*Freedman* v *Maryland,* 380 U. S.], at 58–59." *United States* v. *Thirty-seven Photographs,* 402 U. S., at 367.

supra, at 57–59. See *Blount* v. *Rizzi,* 400 U. S. 410, 419–421 (1971); *Teitel Film Corp.* v. *Cusack,* 390 U. S. 139, 141–142 (1968); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58, 70–71 (1963).

In this case, of course, the film was not subjected to any form of "final restraint," in the sense of being enjoined from exhibition or threatened with destruction. A copy of the film was temporarily detained in order to *preserve it as evidence.* There has been no showing that the seizure of a copy of the film precluded its continued exhibition. Nor, in this case, did temporary restraint in itself "become a form of censorship," even making the doubtful assumption that no other copies of the film existed. Cf. *United States* v. *Thirty-seven Photographs, supra,* at 367; *Freedman* v. *Maryland, supra,* at 57–59. A judicial determination of obscenity, following a fully adversary trial, occurred within 48 days of the temporary seizure. Petitioner made no pretrial motions seeking return of the film or challenging its seizure, nor did he request expedited judicial consideration of the obscenity issue, so it is entirely possible that a prompt judicial determination of the obscenity issue in an adversary proceeding could have been obtained if petitioner had desired.[6] Although we have refrained from establishing rigid, specific time deadlines in proceedings involving seizure of allegedly obscene material, we have definitely excluded from any consideration of "promptness" those delays caused by the choice of the defendant. See *United States* v. *Thirty-seven Photographs, supra,* at 373–374. In this case, the barrier to a prompt judicial determination of the

[6] The State of New York has represented that it stands ready to grant "immediate" adversary hearings on pretrial motions challenging seizures of material arguably protected by the First Amendment. No such motion was made by petitioner.

obscenity issue in an adversary proceeding was not the State, but petitioner's decision to waive pretrial motions and reserve the obscenity issue for trial. Cf. *Kingsley Books, Inc.* v. *Brown*, 354 U. S., at 439.

Petitioner's reliance on the Court's decisions in *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964), and *Marcus* v. *Search Warrant*, 367 U. S. 717 (1961), is misplaced. Those cases concerned the seizure of large quantities of books for the sole purpose of their destruction,[7] and this Court held that, in those circumstances, a prior judicial determination of obscenity in an adversary proceeding was required to avoid "danger of abridgment of the right of the public in a free society to unobstructed circulation of nonobscene books." *A Quantity of Books* v. *Kansas*, *supra*, at 213. We do not disturb this holding. Courts will scrutinize any large-scale seizure of books, films, or other materials presumptively protected under the First Amendment to be certain that the requirements of *A Quantity of Books* and *Marcus* are fully met. "'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" *New York Times Co.* v. *United States*, 403 U. S. 713,

[7] In particular, *Marcus* involved seizure by police officers acting pursuant to a general warrant of 11,000 copies of 280 publications. 367 U. S., at 723. Unlike this case, there was no independent judicial determination of obscenity by a neutral, detached magistrate, nor were the seizures made to preserve evidence for a criminal prosecution. *Id.*, at 732. The sole purpose was to seize the articles as contraband and to cause them "to be publicly destroyed, by burning or otherwise." *Id.*, at 721 n. 6. In *A Quantity of Books* v. *Kansas*, 378 U. S. 205 (1964), 1,715 copies of 31 publications were seized by a county sheriff, also without any prior judicial determination of obscenity and, again, for the sole purpose of destroying the publications as contraband. *Id.*, at 206–209.

714 (1971), quoting *Bantam Books, Inc.* v. *Sullivan,* 372 U. S., at 70; *Organization for a Better Austin* v. *Keefe,* 402 U. S. 415, 419 (1971); *Carroll* v. *Princess Anne,* 393 U. S. 175, 181 (1968). See *Near* v. *Minnesota,* 283 U. S. 697 (1931).

But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the *bona fide* purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film.[8] If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt[9] judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be

[8] In *Mishkin* v. *New York,* 383 U. S. 502 (1966), this Court refused to review the legality of a seizure of books challenged under *A Quantity of Books, supra,* primarily because the record did not reveal the number of books seized as evidence under the warrant or "whether the books seized . . . were on the threshold of dissemination." *Id.,* at 513. If *A Quantity of Books* applied to *all* seizures of obscene material, there would have been no need for the Court to abstain from review in *Mishkin,* since the parties had conceded that there was no prior adversary hearing. This is not to say that multiple copies of a single film may be seized as purely cumulative evidence, or that a State may circumvent *Marcus* or *A Quantity of Books* by incorporating, as an element of a criminal offense, the number of copies of the obscene materials involved.

[9] By "prompt," we mean the shortest period "compatible with sound judicial resolution." See *United States* v. *Thirty-seven Photographs,* 402 U. S., at 367; *Blount* v. *Rizzi,* 400 U. S. 410, 417 (1971); *Freedman* v. *Maryland,* 380 U. S. 51, at 58–59 (1965).

continued pending a judicial determination of the obscenity issue in an adversary proceeding.[10] Otherwise, the film must be returned.[11]

With such safeguards, we do not perceive that an adversary hearing *prior* to a seizure by lawful warrant would materially increase First Amendment protection. Cf. *Carroll* v. *Princess Anne, supra,* at 183–184. The necessity for a prior judicial determination of probable cause will protect against gross abuses, while the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal interference with public circulation pending litigation. The procedure used by New York in this case provides such First Amendment safeguards, while also serving the public interests in full and fair prosecution for obscenity offenses. Counsel for New York has argued that movie films tend to "disappear" if adversary hearings are afforded prior to seizure. We take judicial notice that such films may be compact, readily transported for exhibition in other jurisdictions, easily destructible, and particularly susceptible to alteration by cutting and splicing critical parts of film.

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[10] At oral argument, counsel for petitioner agreed that a prompt opportunity to obtain a copy from the seized film at "an independent lab under circumstances that would assure that there was no tampering with the film" with the original returned within "24 hours" would "satisfy" his "First Amendment position." Tr. of Oral Arg. 28. Petitioner never requested such a copy below.

[11] Failure to permit copying of seized material adversely affects First Amendment interests; prompt copying of seized material should be permitted. If copying is denied, return of the seized material should be required. On the other hand, violations of Fourth Amendment standards would require that the seized material be excluded from evidence. See *Roaden* v. *Kentucky, post,* p. 496; *Lee Art Theatre* v. *Virginia,* 392 U. S., at 637. Cf. *Mapp* v. *Ohio,* 367 U. S. 643 (1961).

Petitioner also challenged his conviction on substantive, as opposed to procedural, ground arguing that he was convicted under standards of obscenity both overbroad and unconstitutionally vague. In addition, petitioner argues that films shown only to consenting adults in private have a particular claim to constitutional protection. In *Miller* v. *California, ante,* p. 15, and *Paris Adult Theatre I* v. *Slaton, ante,* p. 49, decided June 21, 1973, we dealt with these substantive issues. A majority of this Court has now approved guidelines for the lawful state regulation of obscene material. The judgment of the Court of Appeals of the State of New York is therefore vacated and this case remanded for the sole purpose of affording the New York courts an opportunity to reconsider these substantive issues in light of *Miller* and *Paris Adult Theatre I.* See *United States* v. *12 200-ft. Reels of Film, ante,* at 130 n. 7.

Vacated and remanded.

MR. JUSTICE DOUGLAS, dissenting.*

I would reverse outright in each of these cases as, in my view, the underlying obscenity statute violates the First Amendment for the reasons stated in my dissenting opinions in *Miller* v. *California, ante,* p. 37, and *United States* v. *12 200-ft. Reels of Film, ante,* p. 130.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

We granted certiorari to consider the holding of the Court of Appeals of New York that the Constitution does not require an adversary hearing on obscenity prior to a judge's issuance of warrants for the seizure of a

*This opinion applies also to No. 71-1134, *Roaden* v. *Kentucky, post,* p. 496.

film and for the arrest of the film's exhibitor. 29 N. Y. 2d 319, 277 N. E. 2d 651 (1971). The statute under which the prosecution was brought* is, in my view, unconstitutionally overbroad and therefore invalid on its face. See my dissent in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73. I would therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings not inconsistent with my dissenting opinion in *Slaton.* In that circumstance, I have no occasion to consider whether, assuming that a prosecution could properly be brought, the seizure of the film at issue here was constitutional.

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*N. Y. Penal Law § 235.05:

"A person is guilty of obscenity when, knowing its content and character, he:

"1. Promotes, or possesses with intent to promote, any obscene material; or

"2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity."

ROADEN *v.* KENTUCKY

CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

No. 71–1134. Argued November 14, 1972—Decided June 25, 1973

A county sheriff viewed a sexually explicit film at a local drive-in theater. At the conclusion of the showing, he arrested petitioner, the theater manager, for exhibiting an obscene film in violation of Kentucky law, and seized, without a warrant, one copy of the film for use as evidence. There was no prior judicial determination of obscenity. Petitioner's motion to suppress the film as evidence on the ground of illegal seizure was denied, and he was convicted. The Kentucky Court of Appeals affirmed, holding that the concededly obscene film was properly seized incident to a lawful arrest. *Held:* The seizure by the sheriff, without the authority of a constitutionally sufficient warrant, was unreasonable under Fourth and Fourteenth Amendment standards. The seizure is not unreasonable simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. *Lee Art Theatre* v. *Virginia*, 392 U. S. 636; *Marcus* v. *Search Warrant*, 367 U. S. 717. This case does not present an exigent circumstance in which police action must be "now or never" to preserve the evidence of the crime, and where it may be reasonable to permit action without prior judicial approval. Pp. 501–506.

473 S. W. 2d 814, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment in which STEWART and MARSHALL, JJ., joined, *post*, p. 507. DOUGLAS, J., filed a dissenting opinion, *ante*, p. 494.

Phillip K. Wicker argued the cause and filed a brief for petitioner.

Robert V. Bullock, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief was *Ed. W. Hancock*, Attorney General.*

**Charles H. Keating, Jr.*, filed a brief as *amicus curiae* urging affirmance.

MR. CHIEF JUSTICE BURGER delivered the opinion of of the Court.

The question presented in this case is whether the seizure of allegedly obscene material, contemporaneous with and as an incident to an arrest for the public exhibition of such material in a commercial theater may be accomplished without a warrant.

On September 29, 1970, the sheriff of Pulaski County, Kentucky, accompanied by the district prosecutor, purchased tickets to a local drive-in theater. There the sheriff observed, in its entirety, a film called "Cindy and Donna" and concluded that it was obscene and that its exhibition was in violation of a state statute. A substantial part of the film was also observed by a deputy sheriff from a vantage point on the road outside the theater. Since the petitioner conceded the obscenity of the film at trial, that issue is not before us for decision.[1]

The sheriff, at the conclusion of the film, proceeded to the projection booth, where he arrested petitioner, the manager of the theater, on the charge of exhibiting an obscene film to the public contrary to Ky. Rev. Stat. § 436.101 (1973).[2] Concurrent with the arrest, the sheriff

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[1] Petitioner's lawyer made the following statement to the trial jury during the closing arguments:

"I would be good enough to tell you at the outset that, in behalf of Mr. Roaden, I am not going to get up here and defend the film observed yesterday nor the revolting scenes in it or try to argue or persuade you that those scene[s] were not obscene." App. 37.

[2] Kentucky Revised Statutes § 436.101 (1973), reads in relevant part as follows:

"Obscene matter, distribution, penalties, destruction.

"(1) As used in this section:

"(a) 'Distribute' means to transfer possession of, whether with or without consideration.

"(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or

seized one copy of the film for use as evidence. It is uncontested: (a) that the sheriff had no warrant when he made the arrest and seizure, (b) that there had been no

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other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters.

"(d) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(2) Any person who, having knowledge of the obscenity thereof, sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is punishable by fine of not more than $1,000 plus five dollars ($5.00) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars ($10,000), or by imprisonment in the county jail for not more than six (6) months plus one (1) day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment. If such person has previously been convicted of a violation of this subsection, he is punishable by fine of not more than $2,000 plus five dollars ($5.00) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed $25,000, or by imprisonment in the county jail for not more than one (1) year, or by both such fine and such imprisonment. If a person has been twice convicted of a violation of this section, a violation of this subsection is punishable by imprisonment in the state penitentiary not exceeding five (5) years.

. . . . .

"(8) The jury, or the court, if a jury trial is waived, shall render a general verdict, and shall also render a special verdict as to whether the matter named in the charge is obscene. The special

prior determination by a judicial officer on the question of obscenity, and (c) that the arrest was based solely on the sheriff's observing the exhibition of the film.

On September 30, 1970, the day following the arrest of petitioner and the seizure of the film, the Grand Jury of Pulaski County heard testimony concerning the scenes and content of the film and returned an indictment charging petitioner with exhibiting an obscene film in violation of Ky. Rev. Stat. § 436.101. On October 3, 1970, petitioner entered a plea of not guilty in the Pulaski Circuit Court, and the case was set for trial. On October 12, 1970, petitioner filed a motion to suppress the film as evidence and to dismiss the indictment. The motion was predicated upon the ground that the film was "improperly, unlawfully and illegally seized, contrary to . . . the laws of the land." Four days later, on October 16, 1970, the Pulaski Circuit Court heard argument at an adversary hearing on petitioner's motion. The motion was denied.

Petitioner's trial began on October 20, 1970. The arresting sheriff and one of his deputies were the only witnesses for the prosecution. The sheriff testified that the film displayed nudity and "intimate love scenes." The sheriff further testified that, upon viewing the film, he determined that it was obscene and that its exhibition

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verdict or findings on the issue of obscenity may be: 'We find the . . . (title or description of matter) to be obscene,' or, 'We find the . . . (title or description of matter) not to be obscene,' as they may find each item is or is not obscene.

"(9) Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the attorney general, commonwealth's attorney, county attorney, city attorney or their authorized assistants, or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control."

violated state law. He therefore arrested petitioner. Together with the testimony of the sheriff, the film itself was introduced in evidence. Petitioner's motion to suppress the film was renewed, and again overruled. The sheriff's deputy took the stand and testified that he had viewed the final 30 minutes of the film from a vantage point on a public road outside the theater. Following this testimony, the jury was permitted to see the film.

Petitioner testified in his own behalf. He stated that, to his knowledge, no juveniles had been admitted to see the film, and that he had received no complaints about the film until it was seized by the sheriff. At the close of his testimony, the jury found petitioner guilty as charged. The jury rendered both a general verdict of guilty and a special verdict that the film was obscene, as provided by Ky. Rev. Stat. § 436.101 (8).

On appeal, the Court of Appeals of Kentucky affirmed petitioner's conviction. The Court of Appeals first emphasized that "[i]t was conceded by [petitioner's] counsel in closing argument to the jury that the film is obscene. No issue is presented on appeal as to the obscenity of the material." 473 S. W. 2d 814, 815 (1971). The Court of Appeals then held that the film was properly seized incident to a lawful arrest, distinguishing the holdings of this Court in *A Quantity of Books* v. *Kansas,* 378 U. S. 205 (1964), and *Marcus* v. *Search Warrant,* 367 U. S. 717 (1961), on the ground that those decisions related to seizure of allegedly obscene materials "for destruction or suppression, not to seizures incident to an arrest for possessing, selling, or exhibiting a specific item." 473 S. W. 2d, at 815. It also distinguished *Lee Art Theatre* v. *Virginia,* 392 U. S. 636 (1968), on the grounds that there film "had been seized pursuant to a [defective] search warrant, not incident to an arrest." 473 S. W. 2d, at 816. The Court of Appeals relied on a decision of a federal three-judge

court in *Hosey* v. *City of Jackson,* 309 F. Supp. 527 (SD Miss. 1970), which concluded that:

> "[S]eizure of an allegedly obscene film as an incident to lawful arrests for a crime committed in the presence of the arresting officers, i. e., the public showing of such film, does not exceed constitutional bounds in the absence of a prior judicial hearing on the question of its obscenity." *Id.,* at 533.

The Court of Appeals specifically declined to follow a decision by another federal three-judge court in *Ledesma* v. *Perez,* 304 F. Supp. 662 (ED La. 1969), which held unconstitutional the seizure of allegedly obscene material incident to an arrest, but without a warrant or a prior adversary hearing.[3]

I

The Fourth Amendment proscription against "unreasonable . . . seizures," applicable to the States through the Fourteenth Amendment, must not be read in a vacuum. A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material. Cf. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 471–472 (1971); *id.,* at 509–510 (Black, J., concurring and dissenting); *id.,* at 512–513 (WHITE, J., concurring and dissenting). The question to be resolved is whether the seizure of the film without a warrant was unreasonable under Fourth Amendment standards and, if so,

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[3] We vacated the judgment in *Hosey* v. *City of Jackson,* 309 F. Supp. 527 (SD Miss. 1970), on the grounds of the Court's policy of noninterference in state prosecution; we did not reach the merits. *Hosey* v. *City of Jackson,* 401 U. S. 987 (1971). We also vacated the judgment in *Ledesma* v. *Perez,* 304 F. Supp. 662 (ED La. 1969), again on the grounds of noninterference with state criminal proceedings prior to adjudications by state courts. *Perez* v. *Ledesma,* 401 U. S. 82 (1971).

whether the film was therefore inadmissible at the trial. The seizure of instruments of a crime, such as a pistol or a knife, or "contraband or stolen goods or objects dangerous in themselves," *id.*, at 472, are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards.

Marcus v. *Search Warrant, supra,* held that a warrant for the seizure of allegedly obscene books could not be issued on the conclusory opinion of a police officer that the books sought to be seized were obscene. Such a warrant lacked the safeguards demanded "to assure nonobscene material the constitutional protection to which it is entitled. . . . [T]he warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene." 367 U. S., at 731–732. There had been "no step in the procedure before seizure designed to focus searchingly on the question of obscenity." *Id.*, at 732.

The sense of this holding was reaffirmed in *A Quantity of Books* v. *Kansas, supra,* where the Court found unconstitutional a "massive seizure" of books from a commercial bookstore for the purpose of destroying the books as contraband. The result was premised on the lack of an adversary hearing prior to seizure, and the Court did not find it necessary to reach the claim that the seizure violated Fourth Amendment standards. 378 U. S., at 210 n. 2. However, the Court emphasized:

> "It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and

other contraband. We rejected that proposition in *Marcus.*" *Id.*, at 211–212.

Lee Art Theatre v. *Virginia, supra,* was to the same effect with regard to seizure of a film from a commercial theater regularly open to the public. There a warrant for the seizure of the film was issued on the basis of a police officer's affidavit giving the titles of the film and asserting in conclusory fashion that he had personally viewed the films and considered them obscene. The films were seized pursuant to the warrant and introduced into evidence in a criminal case against the exhibitor. Conviction ensued. On review, the Court held that "[t]he admission of the films in evidence requires reversal of petitioner's conviction" because

> "[t]he procedure under which the warrant issued solely upon the conclusory assertions of the police officer without any inquiry by the justice of the peace into the factual basis for the officer's conclusions was not a procedure 'designed to focus searchingly on the question of obscenity,' *id.*, [*Marcus* v. *Search Warrant, supra*] at 732, and therefore fell short of constitutional requirements demanding necessary sensitivity to freedom of expression." 392 U. S., at 637.

No mention was made in the brief *per curiam Lee Art Theatre* opinion as to whether or not the seizure was incident to an arrest. The Court relied on *Marcus* and *A Quantity of Books.*

The common thread of *Marcus, A Quantity of Books,* and *Lee Art Theatre* is to be found in the nature of the materials seized and the setting in which they were taken. See *Stanford* v. *Texas,* 379 U. S. 476, 486 (1965).[4]

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[4] In *Stanford* v. *Texas, supra,* we acknowledged the difference between books and weapons, narcotics, or cases of whiskey.

In each case the material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression.[5] As we stated in *Stanford* v. *Texas, supra:*

> "In short, . . . the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. See *Marcus* v. *Search Warrant,* 367 U. S. 717; *A Quantity of Books* v. *Kansas,* 378 U. S. 205. No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leav-

[5] This does not mean an adversary proceeding is needed before seizure, since a warrant may be issued *ex parte*. *Heller* v. *New York, ante,* p. 483.

> ing the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case." 379 U. S., at 485 (footnotes omitted).

Moreover, ordinary human experience should teach that the seizure of a movie film from a commercial theater with regularly scheduled performances, where a film is being played and replayed to paid audiences, presents a very different situation from that in which contraband is changing hands or where a robbery or assault is being perpetrated. In the latter settings, the probable cause for an arrest might justify the seizure of weapons, or other evidence or instruments of crime, without a warrant. Cf. *Chimel* v. *California,* 395 U. S. 752, 764 (1969); *id.,* at 773–774 (WHITE, J., dissenting); *Preston* v. *United States,* 376 U. S. 364, 367 (1964). Where there are exigent circumstances in which police action literally must be "now or never" to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation.[6] See *Chambers* v. *Maroney,* 399 U. S. 42, 47–51 (1970). Cf. *Carroll* v. *United States,* 267 U. S. 132 (1925). The facts surrounding the "massive seizures" of books in *Marcus*

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[6] Counsel for Kentucky, together with counsel for New York in *Heller* v. *New York, ante,* at 493, and counsel for California as *amicus curiae* in *Heller,* have emphasized that allegedly obscene films are particularly difficult evidence to preserve unless kept in custody. We again take judicial notice that films may be compact, may be easy to destroy or to remove to another jurisdiction, and may be subject to pretrial alterations by cutting out scenes and resplicing reels. See *ibid.* But, as the *Heller* case demonstrates, where films are scheduled for exhibition in a commercial theater open to the public, procuring a warrant based on a prior judicial determination of probable cause of obscenity need not risk loss of the evidence.

and *A Quantity of Books*, or the seizure of the film in *Lee Art Theatre*, presented no such "now or never" circumstances.

II

The film seized in this case was being exhibited at a commercial theater showing regularly scheduled performances to the general public. The seizure proceeded solely on a police officer's conclusions that the film was obscene; there was no warrant. Nothing prior to seizure afforded a magistrate an opportunity to "focus searchingly on the question of obscenity." See *Heller* v. *New York*, *ante*, at 488–489; *Marcus* v. *Search Warrant*, 367 U. S., at 732. If, as *Marcus* and *Lee Art Theatre* held, a warrant for seizing allegedly obscene material may not issue on the mere conclusory allegations of an officer, *a fortiori*, the officer may not make such a seizure with no warrant at all. "The use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. . . . The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Marcus* v. *Search Warrant*, *supra*, at 724, 729. In this case, as in *Lee Art Theatre*, the admission of the film in evidence requires reversal of petitioner's conviction. 392 U. S., at 637.

The judgment of the Court of Appeals of Kentucky is reversed and this case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

[For dissenting opinion of MR. JUSTICE DOUGLAS, see *ante*, p. 494.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, concurring in the judgment.

We granted certiorari to consider the holding of the Court of Appeals of Kentucky that the Constitution does not require an adversary hearing on obscenity prior to the seizure of reels of film, where the seizure is incident to the arrest of the manager of a drive-in movie theater. 473 S. W. 2d 814 (1971). The statute under which the prosecution was brought* is, in my view, unconstitutionally overbroad and therefore invalid on its face. See my dissent in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73. I would therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings not inconsistent with my dissenting opinion in *Slaton.*

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*Ky. Rev. Stat. § 436.101 (2) provides in part that

"Any person who, having knowledge of the obscenity thereof, sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is punishable by fine of not more than $1,000 . . . or by imprisonment in the county jail for not more than six (6) months . . . ."

UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. *v.* MURRY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 72–848. Argued April 23, 1973—Decided June 25, 1973

Appellees challenge the constitutionality of § 5 (b) of the Food Stamp Act of 1964, as amended in 1971, providing that "[a]ny household which includes a member who has reached his eighteenth birthday and who is claimed as a dependent child for Federal income tax purposes by a taxpayer who is not a member of an eligible household, shall be ineligible to participate in any food stamp program . . . during the tax period such dependency is claimed and for a period of one year after the expiration of such tax period." This provision was generated by congressional concern over nonneedy households participating in the food stamp program, and abuses of the program by "college students" and "children of wealthy parents." The District Court held the provision unconstitutional, finding that it went far beyond the congressional goal, and operated inflexibly to deny stamps to households, containing no college students, that had established clear eligibility for stamps and remained in dire need, only because a member of the household 18 years or older is claimed by someone as a tax dependent. *Held:* The tax deduction taken for the benefit of the parent in a prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives, and the administration of the Act allows no hearing to show that the tax deduction is irrelevant to the need of the household. Section 5 (b) therefore violates due process. Pp. 511–514.

348 F. Supp. 242, affirmed.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. STEWART, J., *post*, p. 514, and MARSHALL, J., *post*, p. 517, filed concurring opinions. BLACKMUN, J., filed a dissenting opinion, *post*, p. 520. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL, J., joined, *post*, p. 522.

Keith A. Jones argued the cause for appellants. With him on the briefs were *Solicitor General Griswold, Assistant Attorney General Wood, Walter H. Fleischer,* and *William Kanter.*

Ronald F. Pollack argued the cause for appellees. With him on the brief was *Roger A. Schwartz.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

The Food Stamp Act of 1964, 7 U. S. C. § 2011 *et seq.*, as amended in 1971, 84 Stat. 2048, has been applied to these appellees so as to lead the three-judge District Court to hold one provision of it unconstitutional. 348 F. Supp. 242. We noted probable jurisdiction. 410 U. S. 924.

Appellee Murry has two sons and ten grandchildren in her household. Her monthly income is $57.50, which comes from her ex-husband as support for her sons. Her expenses far exceed her monthly income. By payment, however, of $11 she received $128 in food stamps. But she has now been denied food stamps because her ex-husband (who has remarried) had claimed her two sons and one grandchild as tax dependents in his 1971 income tax return. That claim, plus the fact that her eldest son is 19 years old, disqualified her household for food stamps under § 5 (b) of the Act.[1] Appellee Alderete is in com-

[1] Section 5 (b) of the Act provides in part: "Any household which includes a member who has reached his eighteenth birthday and *who is claimed as a dependent child for Federal income tax purposes by a taxpayer who is not a member of an eligible household,* shall be ineligible to participate in any food stamp program established pursuant to this chapter during the tax period such dependency is claimed and for a period of one year after expiration of such tax period. . . ." 7 U. S. C. § 2014 (b). (Emphasis added.)

The Regulations provide: " 'Dependent' for the purpose of § 271.3 (d) of this subchapter, means a person claimed as a dependent for Federal income tax purposes by a parent or guardian and living apart

parable straits because her ex-husband claimed the five children, who live with their mother, as tax dependents, the oldest being 18 years old. Appellee Beavert's case is similar. Appellee Lee is the mother of five children, her entire income per month being $23 derived from public assistance. Her five children live with her. Her monthly bills are $249, of which $148 goes for food. Her husband is not a member of her household; he in fact deserted her and has supplied his family with no support. But he claimed the two oldest sons, ages 20 and 18, as tax dependents in his 1971 tax return, with the result that the wife's household was denied food stamps. Appellee Nevarez is in comparable straits.

Appellee Joe Valdez is 18 years old and married; and he and his wife have a child. He lives wholly on public

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from the household of such parent or guardian." 7 CFR § 270.2 (q).

"Any household which includes a member who has reached his 18th birthday and who is claimed as a dependent for Federal income tax purposes by a member of a household which is not certified as being eligible for food assistance shall be ineligible to participate in the program during the tax period such dependency is claimed and for a period of 1 year after expiration of such tax period." 7 CFR § 271.3 (d).

The relevant exemption provision in § 151 (e)(1) of the Internal Revenue Code, as amended, 26 U. S. C. § 151 (e)(1) (1970 ed. and Supp. I), reads:

"An exemption of $750 [shall be allowed] for each dependent (as defined in section 152)—

"(A) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than $750, or

"(B) who is a child of the taxpayer and who (i) has not attained the age of 19 at the close of the calendar year in which the taxable year of the taxpayer begins, or (ii) is a student. . . ."

And the term "dependent" is defined as meaning "any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer . . . :

"(1) A son or daughter of the taxpayer . . . ." 26 U. S. C. § 152 (a)(1).

assistance and applied for food stamps. His application was rejected because his father Ben claimed him as a tax dependent in his 1971 income tax return. Joe receives no support from Ben because Ben is in debt and unable to help support Joe.

Appellee Broderson is 18 and married to a 16-year-old wife and they have a small child. Their monthly income is $110 consisting of his wages at a service station. He cannot get food stamps because his father claimed him as a tax dependent. The father, however, gives him no support.

Appellee Schultz is 19 years old and she resides with a girl friend and the latter's two children. Appellee Schultz has no income of any kind but received food stamps for the household where she lived. Food stamps, however, were discontinued when her parents claimed her as a tax dependent but refused to give her any aid. She soon got married, but she and her husband were denied food stamps because her parents had claimed her for tax dependency.

These appellees brought a class action to enjoin the enforcement of the tax dependency provision of the Act; and, as noted, the three-judge court granted the relief.

Appellees are members of households that have been denied food stamp eligibility solely because the households contain persons 18 years or older who have been claimed as "dependents" for federal income tax purposes by taxpayers who are themselves ineligible for food stamp relief. Section 5 (b) makes the entire household of which a "tax dependent" was a member ineligible for food stamps for two years: (1) during the tax year for which the dependency was claimed and (2) during the next 12 months. During these two periods of time § 5 (b) creates a conclusive presumption that the "tax dependent's" household is not needy and has access to nutritional adequacy.

The Acting Administrator of the Food and Nutrition Service of the Department of Agriculture admitted in this case that:

> "[I]n the case of households which have initially been determined to be ineligible for participation in the program on the basis of tax dependency, there are no factual issues to be presented or challenged by the household at such a hearing, other than the issue of whether or not a member of the household has been claimed as a dependent child by a taxpayer who is not a member of a household eligible for food assistance (a fact the household, in most cases, already will have disclosed in its application). If a household states that it has such a tax dependent member, the household is, in conformity with the Food Stamp Act, the program regulations, and the instructions of FNS governing the program administration by State agencies, determined to be ineligible." App. 83.

Thus, in the administration of the Act, a hearing is denied, and is not available as the dissent implies. As stated by the District Court the Act creates "an irrebuttable presumption contrary to fact." 348 F. Supp., at 243. Moreover, an income tax return is filed, say in April 1973, for the year 1972. When the dependency deduction is filed, the year for which the dependency claim was made has already passed. Therefore the disqualification for food stamps cannot apply to 1972 but only to 1973.

The tax dependency provision was generated by congressional concern about nonneedy households participating in the food stamp program.[2] The legislative

[2] Household participation is based on current circumstances, not past needs. Food stamp certifications for households on public assistance coincide with their welfare certification periods. 7 CFR §§ 271.4 (a) (1) and 271.4 (a) (4) (ii). For nonpublic assistance house-

history reflects a concern about abuses of the program by "college students, children of wealthy parents." [3] But, as the District Court said, the Act goes far beyond that goal and its operation is inflexible. "Households containing no college student, that had established clear eligibility for Food Stamps and which still remain in dire need and otherwise eligible are now denied stamps if it appears that a household member 18 years or older is claimed by someone as a tax dependent." 348 F. Supp., at 243.

Tax dependency in a prior year seems to have no relation to the "need" of the dependent in the following year. It doubtless is much easier from the administrative point of view to have a simple tax "dependency" test that will automatically—without hearing, without witnesses, without findings of fact—terminate a household's claim for eligibility for food stamps. Yet, as we recently stated in *Stanley* v. *Illinois,* 405 U. S. 645, 656:

> "[I]t may be argued that unmarried fathers are so seldom fit that Illinois need not undergo the administrative inconvenience of inquiry in any case, including Stanley's. The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the over-

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holds, certification periods last normally only three months. 7 CFR § 271.4 (a) (4) (iii). Longer certification periods are provided only "if there is little likelihood of changes in household status." 7 CFR §§ 271.4 (a) (4) (iii) (b), (c), and (d).

[3] 116 Cong. Rec. 41979.

> bearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones."

We have difficulty in concluding that it is rational to assume that a child is not indigent this year because the parent declared the child as a dependent in his tax return for the prior year. But even on that assumption our problem is not at an end. Under the Act the issue is not the indigency of the child but the indigency of a different household with which the child happens to be living. Members of that different household are denied food stamps if one of its present members was used as a tax deduction in the past year by his parents even though the remaining members have no relation to the parent who used the tax deduction, even though they are completely destitute, and even though they are one, or 10 or 20 in number. We conclude that the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact. It therefore lacks critical ingredients of due process found wanting in *Vlandis* v. *Kline*, 412 U. S. 441, 452; *Stanley* v. *Illinois, supra;* and *Bell* v. *Burson*, 402 U. S. 535.

Affirmed.

MR. JUSTICE STEWART, concurring.

The food stamp program was established in 1964 for the twin purposes of promoting the agricultural economy and alleviating hunger and malnutrition among the needy members of "the other America." 7 U. S. C. § 2011. Under this program, currently needy households whose members comply with a work requirement, 7 U. S. C. §§ 2014 (b), (c), are entitled to purchase enough food stamps to provide those households with nutritionally

adequate diets. In 1971, Congress became concerned with the possibility that nonneedy households were receiving food stamps, and its response was the enactment of Pub. L. 91–671. While the curbing of abuses in the administration of a government program is assuredly a legitimate purpose, that statute has given rise to constitutional questions in the present case and its companion, *United States Department of Agriculture* v. *Moreno, post,* p. 528.

The challenged provision in the present case is § 5 (b) of the Food Stamp Act, 7 U. S. C. § 2014 (b), as amended, 84 Stat. 2049. That section renders ineligible for food stamps any household that includes a member over 18 years of age who has been claimed as a tax dependent by a taxpayer who is not himself eligible for the stamps. What little legislative history there is suggests that the sole reason for enactment of this section was to prevent the receipt of food stamps by the sons and daughters of more affluent families. 116 Cong. Rec. 41979, 41981, 41993, 42021; cf. *Dandridge* v. *Williams,* 397 U. S. 471, 483–484.

Rather than requiring an individualized determination that a particular household linked to a relatively more affluent household by a claimed tax dependency was not in fact needy, Congress chose instead to utilize a conclusive presumption. The simple fact that a *household member* has been claimed as a tax dependent by a non-indigent taxpayer results in the complete termination of benefits for that *entire household* in the relevant tax period and in the subsequent 12 months as well. 7 U. S. C. § 2014 (b). It matters not whether that dependency claim was fraudulent, what the amount of support from the non-indigent taxpayer actually was,[1]

[1] Even if the amount of support received from the taxpayer leaves the household with income below the income eligibility standards, the statute under consideration would terminate benefits. A 5-person

whether that support was still available at the time the welfare officials learned of it, or even whether the claimed dependent was still living in the household.

This Court recently declared unconstitutional, under the Due Process Clause of the Fourteenth Amendment, a Connecticut statute establishing a permanent, conclusive presumption of nonresidency for purposes of qualifying for reduced tuition rates at a state university. *Vlandis* v. *Kline*, 412 U. S. 441. As we said in that case:

> "In sum, since Connecticut purports to be concerned with residency in allocating the rates for tuition and fees at its university system, it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination. Rather, standards of due process require that the State allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates." *Id.*, at 452.

See also *Morrissey* v. *Brewer*, 408 U. S. 471; *Stanley* v. *Illinois*, 405 U. S. 645; *Bell* v. *Burson*, 402 U. S. 535.

Similarly, I think, the conclusive presumption that led to the termination of the appellees' benefits without

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household, for example, might receive $120 in public assistance each month, plus $121 from a divorced non-indigent spouse. If that household had within it a child who was age 18 or older, and if the spouse claimed that child as a dependent, the household would be ineligible for food stamps. Yet in this hypothetical situation, the household's monthly income would be $241, whereas under the Department of Agriculture's own income standards a household of five can earn up to $440 per month without being disqualified for food stamps. 37 Fed. Reg. 7724. The opinion of the Court points out how totally arbitrary the challenged statute is in operation.

any opportunity for them to prove present need denied them due process of law.[2] Accordingly, I concur in the opinion and judgment of the Court.

MR. JUSTICE MARSHALL, concurring.

I join the opinion of the Court. I wish to state briefly what I believe are the analytic underpinnings of that opinion. One aspect of fundamental fairness, guaranteed by the Due Process Clause of the Fifth Amendment, is that individuals similarly situated must receive the same treatment by the Government. As Mr. Justice Jackson put it, the Government "must exercise [its] powers so as not to discriminate between [its] inhabitants except upon some reasonable differentiation fairly related to the object of the regulation." *Railway Express Agency* v. *New York*, 336 U. S. 106, 112 (1949) (concurring opinion). It is a corollary of this requirement that, in order to determine whether persons are indeed similarly situated, "such procedural protections as the particular situation demands" must be provided. *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972). Specifically, we must decide whether, considering the private interest affected and the governmental interest sought to be advanced, a hearing must be provided to one who claims that the application of some general provision of the law aimed at certain abuses will not in fact lower the incidence of those abuses but will instead needlessly harm him. Cf. *Reed* v. *Reed*,

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[2] The Congress has alternative means available to it by which its purpose can be achieved. The Food Stamp Act, as amended, already provides that households must demonstrate present neediness to qualify, 7 U. S. C. § 2014 (b), and that its members must under certain circumstances accept available employment, *id.*, § 2014 (c). There is no reason that enforcement of these provisions cannot be strengthened if the Congress believes that fraud is taking place. There are already criminal penalties in effect for fraudulent acquisition, use, or transfer of food stamps. *Id.*, §§ 2023 (b), (c).

404 U. S. 71 (1971); *Vlandis* v. *Kline*, 412 U. S. 441 (1973). In short, where the private interests affected are very important and the governmental interest can be promoted without much difficulty by a well-designed hearing procedure, the Due Process Clause requires the Government to act on an individualized basis, with general propositions serving only as rebuttable presumptions or other burden-shifting devices. That, I think, is the import of *Stanley* v. *Illinois*, 405 U. S. 645 (1972).

Is this, then, such a case? Appellants argue that Congress could rationally have thought that persons claimed as tax dependents by a taxpayer himself not a member of an eligible household in one year could, during that year and the succeeding one, probably receive sufficient funds from the taxpayer to offset their need for food stamps. If those persons received food stamps, they would be denying to the truly needy some of the limited benefits Congress has chosen to make available. The statute, on this view, is aimed at preventing abuse of the program by persons who do not need the benefits Congress has provided. Even if, as appellants urge, the statute is interpreted to make ineligible for food stamps only those persons validly claimed as tax dependents, see Reply Brief for Appellants 2–3, I do not think that Congress adopted a method for preventing abuse that is reasonably calculated to eliminate only those who abuse the program. In particular, it could not be fairly concluded that, because *one* member of the household had received half his support from a parent, the *entire* household's need for assistance in purchasing food could be offset by outside contributions.

It is, of course, quite simple for Congress to provide an administrative mechanism to guarantee that abusers of the program were eliminated from it. All that is needed is some way for a person whose household would

otherwise be ineligible for food stamps because of this statute to show that the support presently available from the person claiming a member of the household as a tax dependent does not in fact offset the loss of benefits.* Reasonable rules stating what a claimant must show before receiving a hearing on the question could easily be devised. We deal here with a general rule that may seriously affect the ability of persons genuinely in need to provide an adequate diet for their households. In the face of readily available alternatives that might prevent abuse of the program, Congress did not choose a method of reducing abuses that was "fairly related to the object of the regulation," by enacting the statute challenged in this case.

This analysis, of course, combines elements traditionally invoked in what are usually treated as distinct classes of cases, involving due process and equal protection. But the elements of fairness should not be so rigidly cabined. Sometimes fairness will require a hearing to determine whether a statutory classification will advance the legislature's purposes in a particular case so that the classification can properly be used only as a burden-shifting device, while at other times the fact that a litigant falls within the classification will be enough to justify its application. There is no reason, I believe, to categorize inflexibly the rudiments of fairness. Instead, I believe that we must assess the public and private interests affected by a statutory classification and then decide in each instance whether individualized determination is required or categorical treatment is permitted by the Constitution.

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*Such a mechanism must be made available, on the interpretation of the statute advanced by appellants, to persons who contend that they were not validly claimed as dependents.

MR. JUSTICE BLACKMUN, dissenting.

Section 5 (b) of the Food Stamp Act, which the Court today holds unconstitutional, is not happily drafted and surely is not the kind of statute that attracts sympathetic review. Its purposes, however, are conceded to be laudatory. And, indeed, they are, for the statute seeks to prevent widespread abuse of the federal food stamp program by nonindigents and college students, with consequent denial of the full benefit of the program to those seriously in need of assistance.

The Court, however, invalidates § 5 (b) for, apparently, two reasons. The first is that tax dependency in one calendar year is tied to the subject's lack of need in the following year, and this, it is said, has no rational connection. The second, although it may not be clearly articulated, is that all that is needed to disqualify a household is the presence in it of a person over 18 who is claimed as a dependent for federal income tax purposes by someone outside the household. That this is a reason is quite apparent from the Court's special emphasis on the claims of dependency said to have been asserted by the father or parents of appellees Valdez, Broderson, and Schultz, even though the parent or parents, according to affidavits, gave "no support" or refused to give "any aid," to use the Court's words, *ante,* at 511.

For me, neither reason is persuasive. As I read § 5 (b) of the Act, see *ante,* at 509 n. 1, the years of ineligibility for food stamps are "the tax period such dependency is claimed" and the year that follows. They are not the latter year and the one subsequent thereto, as the Court seems to indicate. I confess that there must be some practical awkwardness in relating the food stamp year to the tax dependency year, for one often cannot know that he is being claimed as a tax dependent for a given year until the claimant files his income tax return

for that year some time after its close. Despite this fact, the statute, for me, is clear and, at least, acceptable, and I would not rewrite it on a pragmatic basis, as, I think, the Court has done. Furthermore, the "year after" provision is not without rational basis, for Congress, in allocating limited resources, has determined that by this means it recoups in the later year the loss sustained in the earlier year when food stamps were improperly claimed.

My second concern centers in the meaning of the words, "who is claimed as a dependent child for Federal income tax purposes," in § 5 (b) of the Act. I cannot believe that the mere fact of claiming is sufficient or that that is what Congress intended. It seems obvious to me that "claimed" in this context has only one meaning, that is, *properly* claimed for income tax purposes, and not the mere assertion of dependency in the return. This would be the sensible construction of the statute. It is obvious and clear, from the Court's description of the Valdez, Broderson, and Schultz situations, *ante*, at 510–511, that the parent or parents who claimed those appellees as income tax dependents were not at all entitled to make those claims. They clearly did not satisfy the requirements of § 151 (e)(1) of the Internal Revenue Code of 1954, 26 U. S. C. § 151 (e)(1). Valdez' problem is with his father, not with the food stamp program, if the facts the Court states are accurate. The same is true of Broderson. The same is true of Schultz.

Each of these aspects, which the Court chooses not to analyze and prefers, instead, to resolve by convenient nullification of the statute, could be handled by an appropriate hearing directed to the ascertainment of the actual facts. In that hearing it may be shown whether Joe Valdez, in fact, "receives no support from Ben." If this be true, Joe should not automatically be ineligible

for the program, and Ben's improper claim of Joe as an income tax dependent should have no food stamp consequence whatsoever. So it would be with appellees Broderson and Schultz. The same may be true as to the remaining appellees with respect to whom claims of dependency status, on the affidavits filed, are at least questionable.

I, therefore, would vacate the judgment of the District Court and remand the case for a hearing directed to the development of the underlying facts in the light of § 5 (b) of the Food Stamp Act and of § 151 (e)(1) of the 1954 Internal Revenue Code, and for the entry of a new judgment in the light of those facts as so ascertained.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE POWELL concur, dissenting.

Appellees challenge on constitutional grounds a section of the most recent congressional revision of the Food Stamp Act, 7 U. S. C. § 2011 *et seq.*, whereby households containing persons 18 years or older who have been claimed as "dependents" for income tax purposes are made ineligible to receive food stamps. The Court's opinion sustains this challenge. Referring to what it conceives to be the legislative aim in enacting such a limitation, "a concern about abuses of the program by 'college students, children of wealthy parents,'" the opinion states that "the Act goes far beyond that goal and its operation is inflexible," *ante*, at 513.

Notions that in dispensing public funds to the needy Congress may not impose limitations which "go beyond the goal" of Congress, or may not be "inflexible," have not heretofore been thought to be embodied in the Constitution. In *Dandridge* v. *Williams*, 397 U. S. 471 (1970), the Court rejected this approach in an area of welfare legislation that is indistinguishable from the food

stamp program here involved. There the District Court, in the words of this Court,

> "while apparently recognizing the validity of at least some of these state concerns, nonetheless held that the regulation 'is invalid on its face for overreaching,' 297 F. Supp., at 468—that it violates the Equal Protection Clause '[b]ecause it cuts too broad a swath on an indiscriminate basis as applied to the entire group of AFDC eligibles to which it purports to apply . . . .'" *Id.*, at 484.

Applying the Equal Protection Clause of the Fourteenth Amendment to state action, the Court reversed the District Court and held:

> "[T]he concept of 'overreaching' has no place in this case. For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as 'overreaching' would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought'. . . .
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> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results

> in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78." *Id.*, at 484–485.

In placing the limitations on the availability of food stamps which are involved in this case, Congress has not in any reasoned sense of that word employed a conclusive presumption as stated by the majority, *ante*, at 511, 512, and MR. JUSTICE STEWART in his concurring opinion, *ante*, at 516; it has simply made a legislative decision that certain abuses which it conceived to exist in the program as previously administered were of sufficient seriousness to warrant the substantive limitation which it enacted. There is a qualitative difference between, on the one hand, holding unconstitutional on procedural due process grounds presumptions which conclude factual inquiries without a hearing on such questions as fault, *Bell* v. *Burson*, 402 U. S. 535 (1971), the fitness of an unwed father to be a parent, *Stanley* v. *Illinois*, 405 U. S. 645 (1972), or, accepting the majority's characterization in *Vlandis* v. *Kline*, 412 U. S. 441 (1973), residency, and, on the other hand, holding unconstitutional a duly enacted prophylactic limitation on the dispensation of funds which is designed to cure systemic abuses. Cf. *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973); *Ginsberg* v. *New York*, 390 U. S. 629, 643 (1968).

Thus, we deal not with the law of evidence, but with the extent to which the Fifth Amendment permits this Court to invalidate such a determination by Congress. In *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 487–488 (1955), the Court said:

> "But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

Accord, *Dandridge* v. *Williams, supra; Ferguson* v. *Skrupa,* 372 U. S. 726 (1963); *Flemming* v. *Nestor,* 363 U. S. 603, 611–612 (1960).

The majority concludes that a "deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives." *Ante,* at 514. But judged by the standards of the foregoing cases, the challenged provision of the Food Stamp Act has a legitimate purpose and cannot be said to lack any rational basis. Section 5 (b) declares ineligible for food stamps "[a]ny household which includes a member who has reached his eighteenth birthday and who is claimed as a dependent child for Federal income tax purposes by a taxpayer who is not a member of an eligible household." Thus, in order to disqualify a household for food stamps, the taxpayer claiming one of its members as a dependent must both provide over half of the dependent's support and must himself be a member of a household with an income large enough to disqualify that household for food stamps. These characteristics indicate that the taxpayer is both willing and able to provide his dependent with a significant amount of support. To be sure, there may be no perfect correlation between the fact that the taxpayer is part of a household which has income exceeding food stamp eligibility standards and his provision of enough support to raise his dependent's household above such standards. But there is some correlation, and the provision is, therefore, not irrational. *Dandridge* v. *Williams, supra.**

*The Court's opinion makes much of the facts that there may be no relationship between the tax dependent's parent and the remaining members of the household, that they may be completely destitute, and that they may be one or 10 or 20. *Ante,* at 514. Sec-

Nor is § 5 (b) deprived of a rational basis because disqualification of the household extends one year beyond the year in which the dependency deduction is claimed. Since income tax returns are not filed until after the termination of the tax year, the carryover provision is the only practical means of enforcing the congressional purpose unless Congress were to establish an administrative adjudication procedure wholly independent of the existing tax collection structure. Such an alternative system would doubtless have its own delays, inefficiencies, and inequities. Under these circumstances we cannot say that Congress acted irrationally in judging a person's need in one year by whether he was claimed as a tax dependent in the previous year.

Finally, the fact that the statute as presently administered may operate to deny food stamps on the basis of fraudulent as well as lawful dependency deduction claims does not, as suggested by the three-judge District Court, 348 F. Supp. 242, 243 (DC 1972), render it unconstitu-

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tion 3(e) of the Food Stamp Act, 7 U. S. C. § 2012 (e), provides in relevant part:

"The term 'household' shall mean a group of . . . individuals . . . who . . . are living as one economic unit . . . ."

In its instructions to the state agencies administering the food stamp program, the Department of Agriculture's Food and Nutrition Service defines "economic unit" as meaning that "the common living expenses are shared from the income and resources of all members and that the basic needs of all members are provided for without regard to their ability or willingness to contribute." (Reply Brief for Appellants in No. 72–534, O. T. 1972, *U. S. Dept. of Agriculture* v. *Moreno*, 9 n. 19, *post*, p. 528.)

The majority does not question that Congress could rationally so choose to dispense welfare benefits to "economic units" rather than to individuals. *Dandridge* v. *Williams*, 397 U. S. 471 (1970). Since the resources of the household member claimed as a tax dependent are by definition available to the entire household, it is rational to disqualify such units containing ineligible tax dependents.

tional. A false dependency claim subjects the taxpayer to both civil and criminal penalties, and Congress may reasonably proceed on the assumption that taxpayers will obey the law.

The prior holdings of the Court convince me that this limitation which Congress has placed on the availability of food stamps does not violate the Due Process Clause of the Fifth Amendment and I therefore dissent from the Court's affirmance of the judgment of the District Court.

UNITED STATES DEPARTMENT OF AGRICULTURE ET AL. *v.* MORENO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 72–534. Argued April 23, 1973—Decided June 25, 1973

Section 3(e) of the Food Stamp Act of 1964, as amended in 1971, generally excludes from participation in the food stamp program any household containing an individual who is unrelated to any other household member. The Secretary of Agriculture issued regulations thereunder rendering ineligible for participation in the program any "household" whose members are not "all related to each other." Congress stated that the purposes of the Act were "to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households . . . [and] that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution . . . of our agricultural abundance and will strengthen our agricultural economy . . . ." The District Court held that the "unrelated person" provision of § 3 (e) creates an irrational classification in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. *Held:* The legislative classification here involved cannot be sustained, the classification being clearly irrelevant to the stated purposes of the Act and not rationally furthering any other legitimate governmental interest. In practical operation, the Act excludes, not those who are "likely to abuse the program," but, rather, only those who so desperately need aid that they cannot even afford to alter their living arrangements so as to retain their eligibility. Pp. 533–538.

345 F. Supp. 310, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which DOUGLAS, STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a concurring opinion, *post*, p. 538. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., joined, *post*, p. 545.

A. Raymond Randolph, Jr., argued the cause for appellants. With him on the briefs were *Solicitor General*

Griswold, Assistant Attorney General Wood, Walter H. Fleischer, and *William Kanter.*

Ronald F. Pollack argued the cause for appellees. With him on the brief was *Roger A. Schwartz.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case requires us to consider the constitutionality of § 3 (e) of the Food Stamp Act of 1964, 7 U. S. C. § 2012 (e), as amended in 1971, 84 Stat. 2048, which, with certain exceptions, excludes from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household. In practical effect, § 3 (e) creates two classes of persons for food stamp purposes: one class is composed of those individuals who live in households all of whose members are related to one another, and the other class consists of those individuals who live in households containing one or more members who are unrelated to the rest. The latter class of persons is denied federal food assistance. A three-judge District Court for the District of Columbia held this classification invalid as violative of the Due Process Clause of the Fifth Amendment. 345 F. Supp. 310 (1972). We noted probable jurisdiction. 409 U. S. 1036 (1972). We affirm.

I

The federal food stamp program was established in 1964 in an effort to alleviate hunger and malnutrition among the more needy segments of our society. 7 U. S. C. § 2011. Eligibility for participation in the program is determined on a household rather than an individual basis. 7 CFR § 271.3 (a). An eligible household purchases sufficient food stamps to provide that household with a nutritionally adequate diet. The household pays for the stamps at a reduced rate based

upon its size and cumulative income. The food stamps are then used to purchase food at retail stores, and the Government redeems the stamps at face value, thereby paying the difference between the actual cost of the food and the amount paid by the household for the stamps. See 7 U. S. C. §§ 2013 (a), 2016, 2025 (a).

As initially enacted, § 3 (e) defined a "household" as "a group of *related or non-related* individuals, who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common." [1] In January 1971, however, Congress redefined the term "household" so as to include only groups of *related* individuals.[2] Pursuant to this amendment, the Secretary of Agriculture promulgated regulations rendering ineligible for participation in the program any "household" whose members are not "all related to each other." [3]

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[1] 78 Stat. 703 (emphasis added). The act provided further that "[t]he term 'household' shall also mean a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption." *Ibid.*

[2] 84 Stat. 2048. The 1971 amendment did not affect certain groups of nonrelated individuals over 60 years of age. As amended, § 3 (e) now provides:

"The term 'household' shall mean a group of related individuals (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common. The term 'household' shall also mean (1) a single individual living alone who has cooking facilities and who purchases and prepares food for home consumption, or (2) an elderly person who meets the requirements of section 2019 (h) of this title." 7 U. S. C. § 2012 (e).

[3] Title 7 CFR § 270.2 (jj) provides:

"(jj) 'Household' means a group of persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical,

Appellees in this case consist of several groups of individuals who allege that, although they satisfy the income eligibility requirements for federal food assistance, they have nevertheless been excluded from the program solely because the persons in each group are not "all related to each other." Appellee Jacinta Moreno, for example, is a 56-year-old diabetic who lives with Ermina Sanchez and the latter's three children. They share common living expenses, and Mrs. Sanchez helps to care for appellee. Appellee's monthly income, derived from public assistance, is $75; Mrs. Sanchez receives $133 per month from public assistance. The household pays $135 per month for rent, gas, and electricity, of which appellee pays $50. Appellee spends $10 per month for transportation to a hospital for regular visits, and $5 per month for laundry. That leaves her $10 per month for food and other necessities. Despite her poverty, appellee has been denied federal food assistance solely because she is unrelated to the other members of her household. Moreover, although Mrs. Sanchez and her three children were permitted to purchase $108 worth of food stamps per month for $18, their participation in the program will be

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housekeeping, or child care reasons, who are not residents of an institution or boarding house, and who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common: *Provided,* That:

"(1) When all persons in the group are under 60 years of age, they are all related to each other; and

"(2) When more than one of the persons in the group is under 60 years of age, and one or more other persons in the group is 60 years of age or older, each of the persons under 60 years of age is related to each other or to at least one of the persons who is 60 years of age or older.

"It shall also mean (i) a single individual living alone who purchases and prepares food for home consumption, or (ii) an elderly person as defined in this section, and his spouse."

terminated if appellee Moreno continues to live with them.

Appellee Sheilah Hejny is married and has three children. Although the Hejnys are indigent, they took in a 20-year-old girl, who is unrelated to them, because "we felt she had emotional problems." The Hejnys receive $144 worth of food stamps each month for $14. If they allow the 20-year-old girl to continue to live with them, they will be denied food stamps by reason of § 3 (e).

Appellee Victoria Keppler has a daughter with an acute hearing deficiency. The daughter requires special instruction in a school for the deaf. The school is located in an area in which appellee could not ordinarily afford to live. Thus, in order to make the most of her limited resources, appellee agreed to share an apartment near the school with a woman who, like appellee, is on public assistance. Since appellee is not related to the woman, appellee's food stamps have been, and will continue to be, cut off if they continue to live together.

These and two other groups of appellees instituted a class action against the Department of Agriculture, its Secretary, and two other departmental officials, seeking declaratory and injunctive relief against the enforcement of the 1971 amendment of § 3 (e) and its implementing regulations. In essence, appellees contend,[4] and the District Court held, that the "unrelated person" provision of § 3 (e) creates an irrational classification in violation

[4] Appellees also argued that the regulations themselves were invalid because beyond the scope of the authority conferred upon the Secretary by the statute. The District Court rejected that contention, and appellees have not pressed that argument on appeal. Moreover, appellees did not challenge the constitutionality of the statute's reliance on "households" rather than "individuals" as the basic unit of the food stamp program. We therefore intimate no view on that question.

of the equal protection component of the Due Process Clause of the Fifth Amendment.[5] We agree.

II

Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. See *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972); *Richardson* v. *Belcher*, 404 U. S. 78, 81 (1971); *Dandridge* v. *Williams*, 397 U. S. 471, 485 (1970); *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961). The purposes of the Food Stamp Act were expressly set forth in the congressional "declaration of policy":

> "It is hereby declared to be the policy of Congress . . . to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households. The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to

[5] "[W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.'" *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964); see *Frontiero* v. *Richardson*, 411 U. S. 677, 680 n. 5 (1973); *Shapiro* v. *Thompson*, 394 U. S. 618, 641–642 (1969); *Bolling* v. *Sharpe*, 347 U. S. 497 (1954).

purchase a nutritionally adequate diet through normal channels of trade." 7 U. S. C. § 2011.

The challenged statutory classification (households of related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes of the Act. As the District Court recognized, "[t]he relationships among persons constituting one economic unit and sharing cooking facilities have nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements." 345 F. Supp., at 313.

Thus, if it is to be sustained, the challenged classification must rationally further some legitimate governmental interest other than those specifically stated in the congressional "declaration of policy." Regrettably, there is little legislative history to illuminate the purposes of the 1971 amendment of § 3 (e).[6] The legislative history that does exist, however, indicates that that amendment was intended to prevent so-called "hippies" and "hippie communes" from participating in the food stamp program. See H. R. Conf. Rep. No. 91–1793, p. 8; 116 Cong. Rec. 44439 (1970) (Sen. Holland). The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. As a result, "[a] purpose to discriminate against hippies cannot, in and of itself and without reference to [some independent] considerations in the

[6] Indeed, the amendment first materialized, bare of committee consideration, during a conference committee's consideration of differing House and Senate bills.

public interest, justify the 1971 amendment." 345 F. Supp., at 314 n. 11.

Although apparently conceding this point, the Government maintains that the challenged classification should nevertheless be upheld as rationally related to the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program.[7] In essence, the Government contends that, in adopting the 1971 amendment, Congress might rationally have thought (1) that households with one or more unrelated members are more likely than "fully related" households to contain individuals who abuse the program by fraudulently failing to report sources of income or by voluntarily remaining poor; and (2) that such households are "relatively unstable," thereby increasing the difficulty of detecting such abuses. But even if we were to accept as rational the Government's wholly unsubstantiated assumptions concerning the differences between "related" and "unrelated" households, we still could not agree with the Government's conclusion that the denial of essential

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[7] The Government initially argued to the District Court that the challenged classification might be justified as a means to foster "morality." In rejecting that contention, the District Court noted that "interpreting the amendment as an attempt to regulate morality would raise serious constitutional questions." 345 F. Supp. 310, 314. Indeed, citing this Court's decisions in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), *Stanley* v. *Georgia*, 394 U. S. 557 (1969), and *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972), the District Court observed that it was doubtful, at best, whether Congress, "in the name of morality," could "infringe the rights to privacy and freedom of association *in the home*." 345 F. Supp., at 314. (Emphasis in original.) Moreover, the court also pointed out that the classification established in § 3 (e) was not rationally related "to prevailing notions of morality, since it in terms disquaiifies all households of unrelated individuals, without reference to whether a particular group contains both sexes." *Id.*, at 315. The Government itself has now abandoned the "morality" argument. See Brief for Appellants 9.

federal food assistance to *all* otherwise eligible households containing unrelated members constitutes a rational effort to deal with these concerns.

At the outset, it is important to note that the Food Stamp Act itself contains provisions, wholly independent of § 3 (e), aimed specifically at the problems of fraud and of the voluntarily poor. For example, with certain exceptions, § 5 (c) of the Act, 7 U. S. C. § 2014 (c), renders ineligible for assistance any household containing "an able-bodied adult person between the ages of eighteen and sixty-five" who fails to register for, and accept, offered employment. Similarly, §§ 14 (b) and (c), 7 U. S. C. §§ 2023 (b) and (c), specifically impose strict criminal penalties upon any individual who obtains or uses food stamps fraudulently.[8] The existence of these pro-

[8] Title 7 U. S. C. §§ 2023 (b) and (c) provide:

"(b) Whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization to purchase cards in any manner not authorized by this [Act] or the regulations issued pursuant to this [Act] shall, if such coupons or authorization to purchase cards are of the value of $100 or more, be guilty of a felony and shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years or both, or, if such coupons or authorization to purchase cards are of a value of less than $100, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than $5,000 or imprisoned for not more than one year, or both.

"(c) Whoever presents, or causes to be presented, coupons for payment or redemption of the value of $100 or more, knowing the same to have been received, transferred, or used in any manner in violation of the provisions of this [Act] or the regulations issued pursuant to this [Act] shall be guilty of a felony and shall, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, or, if such coupons are of a value of less than $100, shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than $5,000 or imprisoned for not more than one year, or both."

visions necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses. See *Eisenstadt* v. *Baird,* 405 U. S. 438, 452 (1972); cf. *Dunn* v. *Blumstein,* 405 U. S. 330, 353–354 (1972).

Moreover, in practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud. As previously noted, § 3 (e) defines an eligible "household" as "a group of related individuals . . . [1] living as one economic unit [2] sharing common cooking facilities [and 3] for whom food is customarily purchased in common." Thus, two *unrelated* persons living together and meeting all three of these conditions would constitute a single household ineligible for assistance. If financially feasible, however, these same two individuals can legally avoid the "unrelated person" exclusion simply by altering their living arrangements so as to eliminate any one of the three conditions. By so doing, they effectively create two separate "households," both of which are eligible for assistance. See *Knowles* v. *Butz,* 358 F. Supp. 228 (ND Cal. 1973). Indeed, as the California Director of Social Welfare has explained: [9]

> "The 'related household' limitations will eliminate many households from eligibility in the Food Stamp Program. It is my understanding that the Congressional intent of the new regulations are specifically aimed at the 'hippies' and 'hippie communes.' Most people in this category can and will alter their living arrangements in order to remain eligible for food stamps. However, the AFDC mothers who try to raise their standard of living by sharing housing will be affected. They will not be able to

[9] App. 43.

utilize the altered living patterns in order to continue to be eligible without giving up their advantage of shared housing costs."

Thus, in practical operation, the 1971 amendment excludes from participation in the food stamp program, *not* those persons who are "likely to abuse the program" but, rather, *only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility. Traditional equal protection analysis does not require that every classification be drawn with precise " 'mathematical nicety.' " *Dandridge* v. *Williams*, 397 U. S., at 485. But the classification here in issue is not only "imprecise," it is wholly without any rational basis. The judgment of the District Court holding the "unrelated person" provision invalid under the Due Process Clause of the Fifth Amendment is therefore

Affirmed

MR. JUSTICE DOUGLAS, concurring.

Appellee Jacinta Moreno is a 56-year-old diabetic who lives with Ermina Sanchez and the latter's three children. The two share common living expenses, Mrs. Sanchez helping to care for this appellee. Appellee's monthly income is $75, derived from public assistance, and Mrs. Sanchez' is $133, also derived from public assistance. This household pays $95 a month for rent, of which appellee pays $40, and $40 a month for gas and electricity, of which appellee pays $10. Appellee spends $10 a month for transportation to a hospital for regular visits and $5 a month for laundry. That leaves her $10 a month for food and other necessities. Mrs. Sanchez and the three children received $108 worth of food stamps per month for $18. But under the "unrelated" person

provision of the Act,[1] she will be cut off if appellee Moreno continues to live with her.

Appellee Sheilah Hejny is married and has three children, ages two to five. She and her husband took in a 20-year-old girl who is unrelated to them. She shares in the housekeeping. The Hejnys pay $14 a month and receive $144 worth of food stamps. The Hejnys comprise an indigent household. But if they allow the 20-year-old girl to live with them, they too will be cut off from food stamps by reason of the "unrelated" person provision.

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[1] Section 3 (e) of the Food Stamp Act provides in relevant part:

"The term 'household' shall mean a group of related individuals (including legally adopted children and legally assigned foster children) or non-related individuals over age 60 who are not residents of an institution or boarding house, but are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common." 7 U. S. C. § 2012 (e).

The Regulations provide: " 'Household' means a group of persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping, or child care reasons, who are not residents of an institution or boarding house, and who are living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common: *Provided,* That:

"(1) When all persons in the group are under 60 years of age, they are all related to each other; and

"(2) When more than one of the persons in the group is under 60 years of age, and one or more other persons in the group is 60 years of age or older, each of the persons under 60 years of age is related to each other or to at least one of the persons who is 60 years of age or older." 7 CFR § 270.2 (jj).

"Eligibility for and participation in the program shall be on a household basis. All persons, excluding roomers, boarders, and unrelated live-in attendants necessary for medical, housekeeping, or child care reasons, residing in common living quarters shall be consolidated into a group prior to determining if such a group is a household as determined in § 270.2 (jj) of this subchapter." 7 CFR § 271.3 (a).

Appellee Keppler has a daughter with an acute hearing deficiency who requires instruction in a school for the deaf. The school is in an area where the mother cannot afford to live. So she and her two minor children moved into a nearby apartment with a woman who, like appellee Keppler, is on public assistance but who is not related to her. As a result appellee Keppler's food stamps have been cut off because of the "unrelated" person provision.

These appellees instituted a class action to enjoin the enforcement of the "unrelated" person provision of the Act.

The "unrelated" person provision of the Act creates two classes of persons for food stamp purposes: one class is composed of people who are all related to each other and all in dire need; and the other class is composed of households that have one or more persons unrelated to the others but have the same degree of need as those in the first class. The first type of household qualifies for relief, the second cannot qualify, no matter the need. It is that application of the Act which is said to violate the conception of equal protection that is implicit in the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U. S. 497, 499.

The test of equal protection is whether the legislative line that is drawn bears "some rational relationship to a legitimate" governmental purpose.[2] *Weber* v. *Aetna*

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[2] The purpose of the present Act was stated by Congress:

"[T]o safeguard the health and well-being of the *Nation's* population and *raise levels of nutrition* among low-income households. The Congress hereby finds that the limited food purchasing power of low-income households contributes *to hunger and malnutrition* among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining *adequate national levels of nutrition* will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our

Casualty & Surety Co., 406 U. S. 164, 172. The requirement of equal protection denies government "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective" of the enactment. *Reed* v. *Reed*, 404 U. S. 71, 75–76.

This case involves desperately poor people with acute problems who, though unrelated, come together for mutual help and assistance. The choice of one's associates for social, political, race, or religious purposes is basic in our constitutional scheme. *NAACP* v. *Alabama*, 357 U. S. 449, 460; *De Jonge* v. *Oregon*, 299 U. S. 353, 363; *NAACP* v. *Button*, 371 U. S. 415, 429–431; *Gibson* v. *Florida Legislative Committee*, 372 U. S. 539; *NAACP* v. *Alabama*, 377 U. S. 288. It extends to "the associational rights of the members" of a trade union. *Brotherhood of Railroad Trainmen v. Virginia Bar*, 377 U. S. 1, 8.

I suppose no one would doubt that an association of people working in the poverty field would be entitled to the same constitutional protection as those working in the racial, banking, or agricultural field. I suppose poor people holding a meeting or convention would be under the same constitutional umbrella as others. The dimensions of the "unrelated" person problem under the Food Stamp Act are in that category. As the facts of this case show, the poor are congregating in households where they can better meet the adversities of poverty. This banding together is an expression of the right of freedom of association that is very deep in our traditions.

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agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit *low-income households to purchase a nutritionally adequate diet* through normal channels of trade." 7 U. S. C. § 2011. (Italics added.)

Other like rights have been recognized that are only peripheral First Amendment rights—the right to send one's child to a religious school, the right to study the German language in a private school, the protection of the entire spectrum of learning, teaching, and communicating ideas, the marital right of privacy. *Griswold* v. *Connecticut,* 381 U. S. 479, 482–483.

As the examples indicate, these peripheral constitutional rights are exercised not necessarily in assemblies that congregate in halls or auditoriums but in discrete individual actions such as parents placing a child in the school of their choice. Taking a person into one's home because he is poor or needs help or brings happiness to the household is of the same dignity.

Congress might choose to deal only with members of a family of one or two or three generations, treating it all as a unit. Congress, however, has not done that here. Concededly an individual living alone is not disqualified from the receipt of food stamp aid, even though there are other members of the family with whom he might theoretically live. Nor are common-law couples disqualified: they, like individuals living alone, may qualify under the Act if they are poor—whether they have abandoned their wives and children and however antifamily their attitudes may be. In other words, the "unrelated" person provision was not aimed at the maintenance of normal family ties. It penalizes persons or families who have brought under their roof an "unrelated" needy person. It penalizes the poorest of the poor for doubling up against the adversities of poverty.

But for the constitutional aspects of the problem, the "unrelated" person provision of the Act might well be sustained as a means to prevent fraud. Fraud is a concern of the Act. 7 U. S. C. §§ 2023 (b) and (c). Able-bodied persons must register and accept work or lose their food stamp rights. 7 U. S. C. § 2014 (c). I

could not say that this "unrelated" person provision has no "rational" relation to control of fraud. We deal here, however, with the right of association, protected by the First Amendment. People who are desperately poor but unrelated come together and join hands with the aim better to combat the crises of poverty. The need of those living together better to meet those crises is denied, while the need of households made up of relatives that is no more acute is serviced. Problems of the fisc, as we stated in *Shapiro* v. *Thompson,* 394 U. S. 618, 633, are legitimate concerns of government. But government "may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Ibid.*

The legislative history of the Act indicates that the "unrelated" person provision of the Act was to prevent "essentially unrelated individuals who voluntarily chose to cohabit and live off food stamps" [3]—so-called "hippies" or "hippy communes"—from participating in the food stamp program. As stated in the Conference Report,[4] the definition of household was "designed to prohibit food stamp assistance to communal 'families' of unrelated individuals."

The right of association, the right to invite the stranger into one's home is too basic in our constitutional regime to deal with roughshod. If there are abuses inherent in that pattern of living against which the food stamp program should be protected, the Act must be "narrowly drawn," *Cantwell* v. *Connecticut,* 310 U. S. 296, 307, to meet the precise end. The method adopted and applied to these cases makes § 3 (e) of the Act unconstitutional by reason of the invidious discrimination between the two classes of needy persons.

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[3] See 116 Cong. Rec. 42003.

[4] H. R. Conf. Rep. No. 91–1793, p. 8.

Dandridge v. *Williams*, 397 U. S. 471, is not opposed. It sustained a Maryland grant of welfare, against the claim of violation of equal protection, which placed an upper limit on the monthly amount any single family could receive. The claimants had large families so that their standard of need exceeded the actual grants. Their claim was that the grants of aid considered in light of the size of their families created an invidious discrimination against them and in favor of small needy families. The claim was rejected on the basis that state economic or social legislation had long been judged by a less strict standard than comes into play when constitutionally protected rights are involved. *Id.*, at 484–485. Laws touching social and economic matters can pass muster under the Equal Protection Clause though they are imperfect, the test being whether the classification has some "reasonable basis." *Ibid.* *Dandridge* held that "the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." *Id.*, at 486. But for the First Amendment aspect of the case, *Dandridge* would control here.

Dandridge, however, did not reach classifications touching on associational rights that lie in the penumbra of the First Amendment. Since the "unrelated" person provision is not directed to the maintenance of the family as a unit but treats impoverished households composed of relatives more favorably than impoverished households having a single unrelated person, it draws a line that can be sustained only on a showing of a "compelling" governmental interest.

The "unrelated" person provision of the present Act has an impact on the rights of people to associate for lawful purposes with whom they choose. When state action "may have the effect of curtailing the freedom to

associate" it "is subject to the closest scrutiny." *NAACP* v. *Alabama*, 357 U. S., at 460–461. The "right of the people peaceably to assemble" guaranteed by the First Amendment covers a wide spectrum of human interests—including, as stated in *id.*, at 460, "political, economic, religious, or cultural matters." Banding together to combat the common foe of hunger is in that category. The case therefore falls within the zone represented by *Shapiro* v. *Thompson*, *supra*, which held that a waiting period on welfare imposed by a State on the "in-migration of indigents" penalizing the constitutional right to travel could not be sustained absent a "*compelling* governmental interest." *Id.*, at 631, 634.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE concurs, dissenting.

For much the same reasons as those stated in my dissenting opinion in *United States Department of Agriculture* v. *Murry*, *ante*, p. 522, I am unable to agree with the Court's disposition of this case. Here appellees challenged a provision in the Federal Food Stamp Act, 7 U. S. C. § 2011 *et seq.*, which limited food stamps to related people living in one "household." The result of this provision is that unrelated persons who live under the same roof and pool their resources may not obtain food stamps even though otherwise eligible.

The Court's opinion would make a very persuasive congressional committee report arguing against the adoption of the limitation in question. Undoubtedly, Congress attacked the problem with a rather blunt instrument and, just as undoubtedly, persuasive arguments may be made that what we conceive to be its purpose will not be significantly advanced by the enactment of the limitation. But questions such as this are for Congress, rather than for this Court; our role is limited to the

determination of whether there is any rational basis on which Congress could decide that public funds made available under the food stamp program should not go to a household containing an individual who is unrelated to any other member of the household.

I do not believe that asserted congressional concern with the fraudulent use of food stamps is, when interpreted in the light most favorable to sustaining the limitation, quite as irrational as the Court seems to believe. A basic unit which Congress has chosen for determination of availability for food stamps is the "household," a determination which is not criticized by the Court. By the limitation here challenged, it has singled out households which contain unrelated persons and made such households ineligible. I do not think it is unreasonable for Congress to conclude that the basic unit which it was willing to support with federal funding through food stamps is some variation on the family as we know it—a household consisting of related individuals. This unit provides a guarantee which is not provided by households containing unrelated individuals that the household exists for some purpose other than to collect federal food stamps.

Admittedly, as the Court points out, the limitation will make ineligible many households which have not been formed for the purpose of collecting federal food stamps, and will at the same time not wholly deny food stamps to those households which may have been formed in large part to take advantage of the program. But, as the Court concedes, "[t]raditional equal protection analysis does not require that every classification be drawn with precise 'mathematical nicety,'" *ante,* at 538. And earlier this Term, the constitutionality of a similarly "imprecise" rule promulgated pursuant to the Truth in Lending Act was chal-

lenged on grounds such as those urged by appellees here. In *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973), the imposition of the rule on *all* members of a defined class was sustained because it served to discourage evasion by a substantial portion of that class of disclosure mechanisms chosen by Congress for consumer protection.

The limitation which Congress enacted could, in the judgment of reasonable men, conceivably deny food stamps to members of households which have been formed solely for the purpose of taking advantage of the food stamp program. Since the food stamp program is not intended to be a subsidy for every individual who desires low-cost food, this was a permissible congressional decision quite consistent with the underlying policy of the Act. The fact that the limitation will have unfortunate and perhaps unintended consequences beyond this does not make it unconstitutional.

UNITED STATES CIVIL SERVICE COMMISSION ET AL. *v.* NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL–CIO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 72–634. Argued March 26, 1973—Decided June 25, 1973

Some individual federal employees, an employees' union, and certain local Democratic and Republican political committees filed this action challenging as unconstitutional on its face the prohibition in § 9 (a) of the Hatch Act, 5 U. S. C. § 7324 (a) (2), against federal employees' taking "an active part in political management or in political campaigns." The section defines the phrase as "those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President." The three-judge District Court recognized the "well-established governmental interest in restricting political activities by federal employees," but held that the statutory definition of "political activity," the constitutionality of which was left open in *United Public Workers* v. *Mitchell*, 330 U. S. 75, was vague and overbroad, and thus unconstitutional. *Held:*

1. The holding of *Mitchell, supra,* that federal employees can be prevented from holding a party office, working at the polls, and acting as party paymaster for other party workers is reaffirmed. Congress can also constitutionally forbid federal employees from engaging in plainly identifiable acts of political management and political campaigning, such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate, or proxy to a political party convention. Pp. 554–567.

2. It is the Civil Service Commission's regulations regarding political activity, the legitimate descendants of the 1940 restatement adopted by the Congress, and, in most respects the re-

flection of longstanding interpretations of the statute by the agency charged with its interpretation and enforcement, and the statute itself, that are the bases for rejecting the claim that the Act is unconstitutionally vague and overbroad. Pp. 568–581.

(a) The regulations specifying the various activities deemed prohibited by § 7324 (a) (2) are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and observe, without sacrifice to the public interest, and are not impermissibly vague. Pp. 575–580.

(b) There is nothing fatally overbroad about the statute considered in connection with the Civil Service Commission's construction of its terms represented by the current regulations. The restrictions on endorsements in advertisements, broadcasts, and literature, and on speaking at political party meetings in support of partisan candidates for public or party office, the major areas of difficulty, are clearly stated, are normally performed only in the context of partisan campaigns by one taking an active role in them, and are sustainable just as the other acts of political campaigning are constitutionally proscribable. They do not, therefore, render the rest of the statute vulnerable for overbreadth. P. 580.

(c) Even if the provisions forbidding partisan campaign endorsements and speechmaking were to be considered in some respects constitutionally overbroad, they would not invalidate the entire statute. Pp. 580–581.

346 F. Supp. 578, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 595.

Solicitor General Griswold argued the cause for appellants. With him on the briefs were *Assistant Attorney General Wood, Andrew L. Frey, Robert E. Kopp,* and *Anthony L. Mondello.*

Thomas C. Matthews, Jr., argued the cause for appellees. With him on the brief were *Stephen M. Truitt, Melvin L. Wulf, Ralph J. Temple,* and *Philip Elman.**

*Briefs of *amici curiae* urging affirmance were filed by *Lee Johnson,* Attorney General, *John W. Osburn,* Solicitor General, and *A. J. Laue*

MR. JUSTICE WHITE delivered the opinion of the Court.

On December 11, 1972, we noted probable jurisdiction of this appeal, 409 U. S. 1058, based on a jurisdictional statement presenting the single question whether the prohibition in § 9 (a) of the Hatch Act, now codified in 5 U. S. C. § 7324 (a)(2), against federal employees taking "an active part in political management or in political campaigns," is unconstitutional on its face. Section 7324 (a) provides:

> "An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—
>
> "(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or
>
> "(2) take an active part in political management or in political campaigns.
>
> "For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President." [1]

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and *Thomas H. Denney*, Assistant Attorneys General, for the State of Oregon; and by *Stephen J. Pollak, Richard T. Conway, Leo M. Pellerzi, Donald M. Murtha, Robert H. Chanin, A. L. Zwerdling*, and *Edward J. Hickey, Jr.*, for the Coalition of American Public Employees et al.

[1] The Hatch Act is found in Titles 5 and 18 of the United States Code, both of which have been enacted into positive law. 80 Stat. 378, 62 Stat. 683. Section 7324 (a)(2) of Title 5 is derived from two sections in the Act, with the prohibition against certain political

A divided three-judge court sitting in the District of Columbia had held the section unconstitutional. 346 F. Supp. 578 (1972). We reverse the judgment of the District Court.

I

The case began when the National Association of Letter Carriers, six individual federal employees and certain local Democratic and Republican political committees filed a complaint, asserting on behalf of themselves and all federal employees that 5 U. S. C. § 7324 (a)(2) was unconstitutional on its face and seeking an injunction against its enforcement.[2]

Each of the plaintiffs alleged that the Civil Service Commission was enforcing, or threatening to enforce, the Hatch Act's prohibition against active participation in political management or political campaigns with respect to certain defined activity in which that plaintiff desired to engage.[3] The Union, for example, stated

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activity being found in § 9 (a), 53 Stat. 1148, while the portion defining the proscribed activity stems from § 15, 54 Stat. 771.

[2] The complaint made the same allegations with respect to 5 U. S. C. § 1502 (a)(3), the provision taken from § 12 (a) of the Hatch Act, 54 Stat. 767, which imposes similar prohibitions on certain state employees working in programs that are federally financed. The District Court, however, while holding the class action was proper with respect to federal employees, held that none of the parties was properly representative of state employees covered by the Act. 346 F. Supp. 578, 579 n. 1. Hence only § 7324 (a)(2) with respect to federal employees is before us in this case.

[3] The Union alleged that its members were desirous of

"a. Running in local elections for such offices as school board member, city council member or mayor.

"b. Writing letters on political subjects to newspapers.

"c. Participating as a delegate in a political convention and running for office in a political party.

"d. Campaigning for candidates for political office." App. 6–7.

The Democratic and Republican Committees complained that they had been deterred "from seeking desirable candidates who are Fed-

among other things that its members desired to campaign for candidates for public office. The Democratic and Republican Committees complained of not being able

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eral or state employees covered by the Hatch Act to run on the Democratic or Republican ticket for state and local offices. In addition, numerous individuals who would otherwise desire and be available to become members of Plaintiff Committees have been and continue to be deterred from doing so by said provisions of the Hatch Act." *Id.*, at 7.

Plaintiff Hummel alleged that he desired to engage in a wide variety of political activities including "(1) participation as a delegate in conventions of a political party; (2) public endorsement of candidates of a political party for local, state and national office; (3) work at polling places on behalf of a political party during elections; (4) holding office in a political club. As a result of inquiries of the Civil Service Commission and his knowledge of the Hatch Act, Plaintiff Hummel is aware that such activities violate the Hatch Act." *Id.*, at 7–8.

Plaintiff Pinho alleged that she desired to become a precinct Democratic Committee Woman in the Arlington County Democratic Committee and to campaign for certain Democratic candidates for the United States House of Representatives and for the United States Senate. *Id.*, at 8.

Plaintiff Mandicino alleged that as an active member and officer of plaintiff Union he "was compelled to engage in political activities prohibited by . . . the Hatch Act in order to carry out the responsibilities of his offices," and that he had engaged in those "activities including house-to-house campaigning for candidates of political parties, participation as a delegate in conventions of a political party, active participation in the affairs of a political party, and fund raising on behalf of political parties and candidates." *Ibid.*

Plaintiff Wylie alleged that he had resigned his position in the Department of Health, Education, and Welfare, a position in the competitive civil service, to run as a Republican candidate for the Maryland State Senate. During the campaign he was employed as a consultant by the Department on a part-time basis. After his defeat he sought re-employment on a permanent basis but because of the dispute over his political activities while acting as a consultant, his re-employment had been delayed for a period of time, all to his financial loss and mental anguish. *Id.*, at 9.

Plaintiff Gee alleged that he desired to, but did not, file as a

to get federal employees to run for state and local offices. Plaintiff Hummel stated that he was aware of the provision of the Hatch Act and that the activities he desired to engage in would violate that Act as, for example, his participating as a delegate in a party convention or holding office in a political club.

A three-judge court was convened, and the case was tried on both stipulated evidence and oral testimony. The District Court then ruled that § 7324 (a)(2) was unconstitutional on its face and enjoined its enforcement. The court recognized the "well-established governmental interest in restricting political activities by federal employees which [had been] asserted long before enactment of the Hatch Act," 346 F. Supp., at 579, as well as the fact that the "appropriateness of this governmental objective was recognized by the Supreme Court of the United States when it endorsed the objectives of the Hatch Act. United Public Workers v. Mitchell, 330 U. S. 75 . . . (1947) . . . ." *Id.*, at 580. The District Court ruled, however, that *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947), left open the constitutionality of the statutory definition of "political activity," 346 F. Supp., at 580, and proceeded to hold that definition to be both vague and overbroad, and therefore unconstitutional and unenforceable against the plaintiffs in any respect. The District Court also added, *id.*, at 585, that even if the Supreme Court in *Mitchell* could be said to have upheld the definitional section in its entirety, later decisions had so eroded the holding

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candidate for the office of Borough Councilman in his local community for fear that his participation in a partisan election would endanger his job. *Ibid.*

Plaintiff Myers alleged that he desired to run as a Republican candidate in the 1971 partisan election for the mayor of West Lafayette, Indiana, and that he would do so except for fear of losing his job by reason of violation of the Hatch Act. *Id.*, at 10.

that it could no longer be considered binding on the District Court.

II

As the District Court recognized, the constitutionality of the Hatch Act's ban on taking an active part in political management or political campaigns has been here before. This very prohibition was attacked in the *Mitchell* case by a labor union and various federal employees as being violative of the First, Ninth, and Tenth Amendments and as contrary to the Fifth Amendment by being vague and indefinite, arbitrarily discriminatory, and a deprivation of liberty. The Court there first determined that with respect to all but one of the plaintiffs there was no case or controversy present within the meaning of Art. III because the Court could only speculate as to the type of political activity the appellants there desired to engage in or as to the contents of their proposed public statements or the circumstances of their publication. As to the plaintiff Poole, however, the Court noted that "[h]e was a ward executive committeeman of a political party and was politically active on election day as a worker at the polls and a paymaster for the services of other party workers." 330 U. S., at 94. Plainly, the Court thought, these activities fell within the prohibition of § 9 (a) of the Hatch Act against taking an active part in political management or political campaigning; and "[t]hey [were] also covered by the prior determinations of the [Civil Service] Commission," *id.*, at 103 (footnote omitted), as incorporated by § 15 of the Hatch Act,[4] the Court relying on a

[4] Section 15 of the Hatch Act, now codified in 5 U. S. C. § 7324 (a)(2), see n. 1, *supra*, defined the prohibition against taking "an active part in political management or in political campaigns" as proscribing those activities that the Civil Service Commission had determined up to the time of the passage of the Hatch Act were

Civil Service Commission publication, Political Activity and Political Assessments, Form 1236, Sept. 1939, for the latter conclusion. *Id.*, at 103 n. 38. Poole's complaint thus presented a case or controversy for decision, the question being solely whether the Hatch Act "without violating the Constitution, [could make this conduct] the basis for disciplinary action." *Id.*, at 94. The Court held that it could. "[T]he practice of excluding classified employees from party offices and personal political activity at the polls ha[d] been in effect for several decades," *id.*, at 96; and the Court, over a single dissent, in *Ex parte Curtis,* 106 U. S. 371 (1882), had previously upheld the longstanding prohibition forbidding federal employees "from giving or receiving money for political purposes from or to other employees of the government," 330 U. S., at 96. "The conviction that an actively partisan governmental personnel threatens good administration has deepened since . . . *Curtis,*" *id.*, at 97–98, Congress having recognized the "danger to the service in that political rather than official effort may earn advancement and to the public in that governmental favor may be channeled through political connections." *Id.*, at 98 (footnote omitted).

The Government, the Court thought, was empowered to prevent federal employees from contributing energy as well as from collecting money for partisan political ends: "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers or workers, we see no constitutional objection." *Id.*, at 99 (footnote omitted). Another Congress might determine otherwise, but "[t]he teaching of experience . . . evi-

prohibited for classified civil service employees. The role and scope of § 15 are discussed in the text, *infra.*

dently led Congress to enact the Hatch Act," *id.*, at 99, which the Court refused to invalidate and which it viewed as leaving "untouched full participation by employees in political decisions at the ballot box and forbids only the partisan activity of federal personnel deemed offensive to efficiency." *Ibid.* The Act did not interfere with a "wide range of public activities." *Id.*, at 100. It was "only partisan political activity that is interdicted. . . . [Only] active participation in political management and political campaigns [is proscribed]. Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success." *Ibid.* The Court concluded that what Mr. Poole had done was within the power of Congress and the Executive to prevent.

We unhesitatingly reaffirm the *Mitchell* holding that Congress had, and has, the power to prevent Mr. Poole and others like him from holding a party office, working at the polls, and acting as party paymaster for other party workers. An Act of Congress going no farther would in our view unquestionably be valid. So would it be if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees.

A

Such decision on our part would no more than confirm the judgment of history, a judgment made by this country over the last century that it is in the best interest of the country, indeed essential, that federal service should depend upon meritorious performance rather than political service, and that the political influence of federal employees on others and on the electoral process should be limited. That this judgment eventuated is indisputable, and the major steps in reaching it may be simply and briefly set down.

Early in our history, Thomas Jefferson was disturbed by the political activities of some of those in the Executive Branch of the Government. See 10 J. Richardson, Messages and Papers of the Presidents 98 (1899). The heads of the executive departments, in response to his directive, issued an order stating in part that "[t]he right of any officer to give his vote at elections as a qualified citizen is not meant to be restrained, nor, however given, shall it have any effect to his prejudice; but it is expected that he will not attempt to influence the votes of others nor take any part in the business of electioneering, that being deemed inconsistent with the spirit of the Constitution and his duties to it." *Id.*, at 98–99.[5]

There were other voices raised in the 19th century against the mixing of partisan politics and routine federal service. But until after the Civil War, the spoils system under which federal employees came and went, depending upon party service and changing administrations, rather than meritorious performance, was much the vogue and the prevalent basis for governmental em-

[5] Senator Hatch quoted from this order in the debate on the 1940 amendments to the Hatch Act, 86 Cong. Rec. 2433–2434.

ployment and advancement. 1 Report of Commission on Political Activity of Government Personnel, Findings and Recommendations 7–8 (1968). That system did not survive. Congress authorized the President to prescribe regulations for the creation of a civil service of federal employees in 1871, 16 Stat. 514; but it was the Civil Service Act of 1883, c. 27, 22 Stat. 403, known as the Pendleton Act, H. Kaplan, The Law of Civil Service 9–10 (1958), that declared that "no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service" and that "no person in said service has any right to use his official authority or influence to coerce the political action of any person or body." 22 Stat. 404. That Act authorized the President to promulgate rules to carry the Act into effect and created the Civil Service Commission as the agency or administrator of the Act under the rules of the President.

The original Civil Service rules were promulgated on May 7, 1883, by President Arthur. Civil Service Rule I repeated the language of the Act that no one in the executive service should use his official authority or influence to coerce any other person or to interfere with an election, but went no further in restricting the political activities of federal employees. 8 J. Richardson, Messages and Papers of the Presidents 161 (1899). Problems with political activity continued to arise, Twenty-fourth Annual Report of the Civil Service Commission 7–9 (1908),[6] and one form of remedial action was taken in 1907 when, in accordance with Executive Order 642 issued by President Theodore Roosevelt, 1 Report of Commis-

[6] In 1886, for example, President Cleveland, through an Executive Order, warned federal employees "against the use of their official positions in attempts to control political movements in their localities." 8 J. Richardson, Messages and Papers of the Presidents 494 (1899).

sion on Political Activity, *supra,* at 9, § 1 of Rule I was amended to read as follows:

> "No person in the Executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. *Persons who, by the provisions of these rules are in the competitive classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no active part in political management or in political campaigns.*" Twenty-fourth Annual Report of the Civil Service Commission, *supra,* at 104 (emphasis added).

It was under this rule that the Commission thereafter exercised the authority it had to investigate, adjudicate, and recommend sanctions for federal employees thought to have violated the rule. See Howard, Federal Restrictions on the Political Activity of Government Employees, 35 Am. Pol. Sci. Rev. 470, 475 (1941). In the course of these adjudications, the Commission identified and developed a body of law with respect to the conduct of federal employees that was forbidden by the prohibition against taking an active part in political management or political campaigning. Adjudications under Civil Service Rule I spelled out the scope and meaning of the rule in the mode of the common law, 86 Cong. Rec. 2341–2342; and the rules fashioned in this manner were from time to time stated and restated by the Commission for the guidance of the federal establishment. Civil Service Form 1236 of September 1939, for example, purported to publish and restate the law of "Political Activity and Political Assessments" for federal officeholders and employees.

Civil Service Rule I covered only the classified service. The experience of the intervening years, particularly that

of the 1936 and 1938 political campaigns, convinced a majority in Congress that the prohibition against taking an active part in political management and political campaigns should be extended to the entire federal service. 84 Cong. Rec. 4303, 9595, 9604, and 9610. A bill introduced for this purpose, S. 1871, "to prevent pernicious political activities," easily passed the Senate, 84 Cong. Rec. 4191–4192; but both the constitutionality and the advisability of purporting to restrict the political activities of employees were heatedly debated in the House. *Id.*, at 9594–9639. The bill was enacted, however. 53 Stat. 1147. This was the so-called Hatch Act, named after the Senator who was its chief proponent. In its initial provisions, §§ 1 and 2, it forbade anyone from coercing or interfering with the vote of another person and prohibited federal employees from using their official positions to influence or interfere with or affect the election or nomination of certain federal officials. Sections 3 and 4 of the Act prohibited the promise of, or threat of termination of, employment or compensation for the purpose of influencing or securing political activity, or support or opposition for any candidate.

Section 9 (a), which provided the prohibition against political activity now found in 5 U. S. C. § 7324 (a)(2), with which we are concerned in this case, essentially restated Civil Service Rule I, with an important exception. It made it

> "unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or

> in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects."

Excepted from the restriction were the President, Vice President, and specified officials in policy-making positions. Section 9 (b) required immediate removal for violators and forbade the use of appropriated funds thereafter to pay compensation to such persons.

Section 9 differed from Civil Service Rule I in important respects. It applied to all persons employed by the Federal Government, with limited exceptions; it made dismissal from office mandatory upon an adjudication of a violation; and, whereas Civil Service Rule I had stated that persons retained the right to express their private opinions on all political subjects, the statute omitted the word "private" and simply privileged all employees "to express their opinions on all political subjects."

On the day prior to signing the bill, President Franklin Roosevelt sent a message to Congress stating his conviction that the bill was constitutional and recommending that Congress at its next session consider extending the Act to state and local government employees. 84 Cong. Rec. 10745–10747 and 10875. This, Congress quickly proceeded to do. The Act of July 19, 1940, c. 640, 54 Stat. 767, extended the Hatch Act to officers and employees of state and local agencies "whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States . . . ." The Civil Service Commission was empowered under § 12 (b) to investigate and adjudicate violations of the Act by state and local employees. Also relevant for present purposes, § 9 (a) of the Hatch Act was amended so that all persons covered by the Act were free to "express their opinions on all political subjects *and candidates.*" (Emphasis

added.) Moreover, § 15 defined § 9 (a)'s prohibition against taking an active part in political management or in political campaigns as proscribing "the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns." Under § 18, now 5 U. S. C. § 7326, the prohibition against political activity was not to be construed to prohibit political activity in nonpartisan elections or in connection with questions not specifically identified with any national or state political party, such as "questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character . . . ." [7]

In 1950, § 9 (b), of the Act, requiring removal from office for violating the Act, was amended by providing that the Commission by unanimous vote could impose a lesser penalty, but in no case less than 90 days' suspension without pay. 64 Stat. 475. The minimum sanction was reduced to 30 days' suspension without pay in 1962. 76 Stat. 750.

In 1966, Congress determined to review the restrictions of the Hatch Act on the partisan political activities of public employees. For this purpose, the Commission on Political Activity of Government Personnel was created.

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[7] The 1940 amendments to the Hatch Act, 54 Stat. 767–772, also provided, *inter alia*, for a limitation on certain campaign contributions, § 13; for federal employees in municipalities in the vicinity of the District of Columbia, with the approval of the Commission, to engage in political activity, § 16; and for a limitation on receipts and expenditures of political committees, § 20.

80 Stat. 868. The Commission reported in 1968, recommending some liberalization of the political-activity restrictions on federal employees, but not abandoning the fundamental decision that partisan political activities by government employees must be limited in major respects. 1 Report of Commission on Political Activity of Government Personnel, *supra*. Since that time, various bills have been introduced in Congress, some following the Commission's recommendations [8] and some proposing much more substantial revisions of the Hatch Act.[9] In 1972, hearings were held on some proposed legislation; but no new legislation has resulted.[10]

This account of the efforts by the Federal Government to limit partisan political activities by those covered by the Hatch Act should not obscure the equally relevant fact that all 50 States have restricted the political activities of their own employees.[11]

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[8] H. R. 2372, 91st Cong., 1st Sess.; S. 2032, 92d Cong., 1st Sess.; S. 3417, 92d Cong., 2d Sess.; S. 235, 93d Cong., 1st Sess. For the legislation recommended by the Commission on Political Activity, see 1 Report of Commission on Political Activity of Government Personnel, Findings and Recommendations 44–60 (1968).

[9] H. R. 19214, 91st Cong., 2d Sess.; H. R. 914, 92d Cong., 1st Sess.; S. 3374, 92d Cong., 2d Sess.; H. R. 668, S. 350, 93d Cong., 1st Sess.

[10] Hearings on S. 3374 and S. 3417 before the Senate Committee on Post Office and Civil Service, 92d Cong., 2d Sess. Congress has extended the restrictions on political activity to persons not previously covered. The Economic Opportunity Act of 1964, § 603, 78 Stat. 530, as amended, 42 U. S. C. § 2943, extended the restrictions to certain employees of private corporations; the Postal Reorganization Act, 84 Stat. 719, 39 U. S. C. § 410, made the provisions applicable to the Postal Service; and the Emergency Employment Act of 1971, § 12 (h), 85 Stat. 154, 42 U. S. C. § 4881 (h) (1970 ed., Supp. I), extended the provisions to personnel employed in the administration of programs established under the Act.

[11] See generally *Broadrick* v. *Oklahoma*, *post*, p. 601, and *id.*, at 604–605, n. 2.

B

Until now, the judgment of Congress, the Executive, and the country appears to have been that partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly, elections are to play their proper part in representative government, and employees themselves are to be sufficiently free from improper influences. *E. g.*, 84 Cong. Rec. 9598, 9603; 86 Cong. Rec. 2360, 2621, 2864, 9376. The restrictions so far imposed on federal employees are not aimed at particular parties, groups, or points of view, but apply equally to all partisan activities of the type described. They discriminate against no racial, ethnic, or religious minorities. Nor do they seek to control political opinions or beliefs, or to interfere with or influence anyone's vote at the polls.

But, as the Court held in *Pickering* v. *Board of Education*, 391 U. S. 563, 568 (1968), the government has an interest in regulating the conduct and "the speech of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." Although Congress is free to strike a different balance than it has, if it so chooses, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations on partisan political activities now contained in the Hatch Act.

It seems fundamental in the first place that employees in the Executive Branch of the Government, or those working for any of its agencies, should administer the law

in accordance with the will of Congress, rather than in accordance with their own or the will of a political party. They are expected to enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof. A major thesis of the Hatch Act is that to serve this great end of Government—the impartial execution of the laws—it is essential that federal employees, for example, not take formal positions in political parties, not undertake to play substantial roles in partisan political campaigns, and not run for office on partisan political tickets. Forbidding activities like these will reduce the hazards to fair and effective government. See 84 Cong. Rec. 9598; 86 Cong. Rec. 2433–2434, 2864; Hearings on S. 3374 and S. 3417 before the Senate Committee on Post Office and Civil Service, 92d Cong., 2d Sess., 171.

There is another consideration in this judgment: it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

Another major concern of the restriction against partisan activities by federal employees was perhaps the immediate occasion for enactment of the Hatch Act in 1939. That was the conviction that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine. The experience of the 1936 and 1938 campaigns convinced Congress that these dangers were sufficiently real that substantial barriers should be raised against the party in power—or the party out of power, for that matter—using the thousands or hundreds of thousands of federal employees, paid for at public expense, to man its

political structure and political campaigns. *E. g.*, 84 Cong. Rec. 9595, 9598, 9604, 9610.

A related concern, and this remains as important as any other, was to further serve the goal that employment and advancement in the Government service not depend on political performance, and at the same time to make sure that Government employees would be free from pressure and from express or tacit invitation to vote in a certain way or perform political chores in order to curry favor with their superiors rather than to act out their own beliefs. See, *e. g.*, *id.*, at 9598, 9603; 86 Cong. Rec. 2433–2434; Hearings on S. 3374 and S. 3417, *supra*, at 171. It may be urged that prohibitions against coercion are sufficient protection; but for many years the joint judgment of the Executive and Congress has been that to protect the rights of federal employees with respect to their jobs and their political acts and beliefs it is not enough merely to forbid one employee to attempt to influence or coerce another.[12] For example, at the hearings in 1972 on proposed legislation for liberalizing the prohibition against political activity, the Chairman of the Civil Service Commission stated that "the prohibitions against active participation in partisan political

[12] In the 1940 debate over amendments to the Hatch Act, it was frequently stated that the only objectionable provisions were those restrictions in § 9 and the proposed § 12 against voluntary political activity, see, *e. g.*, 86 Cong. Rec. 2626, 2696, 2700, 2708, 2722. In response to the inquiry whether he was condemning those "who, without any coercion, voluntarily desire to take a part in politics," Senator Hatch replied that he "would draw the line if it could be drawn; but I defy . . . [anyone] to draw that line." *Id.*, at 2626. During the 1967 hearings before the Commission on Political Activity the then Chairman of the Civil Service Commission noted that "one man's coercion is another man's persuasion," and that "in an employer/employee relationship, the extent of voluntaryism tends to be rather substantially circumscribed." 3 Report of Commission on Political Activity of Government Personnel, Hearings, 759 (1968).

management and partisan political campaigns constitute the most significant safeguards against coercion . . . ." Hearings on S. 3374 and S. 3417, *supra*, at 52. Perhaps Congress at some time will come to a different view of the realities of political life and Government service; but that is its current view of the matter, and we are not now in any position to dispute it. Nor, in our view, does the Constitution forbid it.

Neither the right to associate nor the right to participate in political activities is absolute in any event. See, *e. g.*, *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973); *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972); *Bullock* v. *Carter*, 405 U. S. 134, 140–141 (1972); *Jenness* v. *Fortson*, 403 U. S. 431 (1971); *Williams* v. *Rhodes*, 393 U. S. 23, 30–31 (1968). Nor are the management, financing, and conduct of political campaigns wholly free from governmental regulation.[13] We agree with the basic holding of *Mitchell* that plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited. Until now this has been the judgment of the lower federal courts,[14] and we do not understand the District Court in this case to have questioned the constitutionality of a law that was specifically limited to prohibiting the conduct in which Mr. Poole in the *Mitchell* case admittedly engaged.

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[13] See, *e. g.*, 18 U. S. C. § 594 (intimidation of voters); § 597 (expenditures to influence voting); § 602 (solicitation of political contributions); and § 612 (publication or distribution of political statements).

[14] See, *e. g.*, *Northern Virginia Regional Park Authority* v. *U. S. Civil Service Comm'n*, 437 F. 2d 1346 (CA4), cert. denied, 403 U. S. 936 (1971); *Fishkin* v. *U. S. Civil Service Comm'n*, 309 F. Supp. 40 (ND Cal. 1969), appeal dismissed as untimely, 396 U. S. 278 (1970); *Kearney* v. *Macy*, 409 F. 2d 847 (CA9 1969), cert. denied, 397 U. S. 943 (1970); *Engelhardt* v. *U. S. Civil Service Comm'n*, 197 F. Supp. 806 (MD Ala. 1961), aff'd *per curiam*, 304 F. 2d 882 (CA5 1962).

III

But however constitutional the proscription of identifiable partisan conduct in understandable language may be, the District Court's judgment was that § 7324 (a)(2) was both unconstitutionally vague and fatally overbroad. Appellees make the same contentions here, but we cannot agree that the section is unconstitutional on its face for either reason.

As an initial matter, we must have clearly in mind the statutory prohibitions that we are examining for impermissible vagueness and overbreadth.

Section 7324 (a)(2) provides that an employee in an executive agency must not take "an active part in political management or in political campaigns" and goes on to say that this prohibition refers to "those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President." Section 7324 (b) privileges an employee to vote as he chooses and to express his opinion on political subjects and candidates, and §§ 7324 (c) and (d), as well as § 7326, also limit the applicability of § 7324 (a)(2).[15]

[15] Title 5 U. S. C. § 7324 provides:

"(a) An employee in an Executive agency or an individual employed by the government of the District of Columbia may not—

"(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or

"(2) take an active part in political management or in political campaigns.

"For the purpose of this subsection, the phrase 'an active part in political management or in political campaigns' means those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President.

"(b) An employee or individual to whom subsection (a) of this

The principal issue with respect to this statutory scheme is what Congress intended when it purported to define "an active part in political management or in political campaigns," as meaning the prior interpretations by the Civil Service Commission under Civil Service Rule I which contained the identical prohibition.

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section applies retains the right to vote as he chooses and to express his opinion on political subjects and candidates.

"(c) Subsection (a) of this section does not apply to an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by the District of Columbia or by a recognized religious, philanthropic, or cultural organization.

"(d) Subsection (a)(2) of this section does not apply to—

"(1) an employee paid from the appropriation for the office of the President;

"(2) the head or the assistant head of an Executive department or military department;

"(3) an employee appointed by the President, by and with the advice and consent of the Senate, who determines policies to be pursued by the United States in its relations with foreign powers or in the nationwide administration of Federal laws;

"(4) the Commissioners of the District of Columbia; or

"(5) the Recorder of Deeds of the District of Columbia."

Title 5 U. S. C. § 7326 states:

"Section 7324 (a)(2) of this title does not prohibit political activity in connection with—

"(1) an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected; or

"(2) a question which is not specifically identified with a National or State political party or political party of a territory or possession of the United States.

"For the purpose of this section, questions relating to constitutional amendments, referendums, approval of municipal ordinances, and others of a similar character, are deemed not specifically identified with a National or State political party or political party of a territory or possession of the United States."

Earlier in this opinion it was noted that this definition was contained in § 15 of the 1940 Act. As recommended by the Senate Committee, S. Rep. No. 1236, 76th Cong., 3d Sess., 2, 4, § 15 conferred broad rulemaking authority on the Civil Service Commission to spell out the meaning of "an active part in political management or in political campaigns." [16] There were, in any event, strong objections to extending the Hatch Act to those state employees working in federally financed programs, see, *e. g.*, 86 Cong. Rec. 2486, 2793–2794, 2801–2802, and to § 15, in particular, as being an unwise and invalid delegation of legislative power to the Commission. See, *e. g.*, *id.*, at 2352, 2426–2427, 2579, 2794, 2875. The matter was vigorously debated; and ultimately Senator Hatch, the principal proponent and manager of the bill, offered a substitute for § 15, *id.*, at 2928 and 2937, limiting the reach of the prohibition to those same activities that the Commission "has heretofore determined are at the time of the passage of this act prohibited on the part of employees" in the classified service by the similar provision in Civil Service Rule I.[17] The matter was further de-

[16] Section 15, as reported out of the Senate Committee, provided:

"SEC. 15. The United States Civil Service Commission is hereby authorized and directed to promulgate, as soon as practicable, rules or regulations defining, for the purposes of this act, the term 'active part in political management or in political campaigns.' After the promulgation of such rules or regulations, the term 'active part in political management or in political campaigns,' as used in this act, shall have the meaning ascribed to it by such rules or regulations. The Commission is authorized to amend such rules or regulations from time to time as it deems necessary." 86 Cong. Rec. 2352.

[17] The substitute for the section recommended by the Committee provided:

"SEC. 15. The provisions of this act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit

bated, and the amendment carried. *Id.*, at 2958–2959.

The District Court and appellees construe § 15, now part of § 7324 (a)(2), as incorporating each of the several thousand adjudications of the Civil Service Commission under Civil Service Rule I, many of which are said to be undiscoverable, inconsistent, or incapable of yielding any meaningful rules to govern present or future conduct. In any event, the District Court held the prohibition against taking an active part in political management and political campaigns to be itself an insufficient guide to employee behavior and thought the definitional addendum of § 15 only compounded the confusion by referring the concerned employees to an impenetrable jungle of Commission proceedings, orders, and rulings. 346 F. Supp., at 582–583, 585.

We take quite a different view of the statute. As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations. With this in mind and having examined with some care the proceedings surrounding the passage of the 1940 Act and adoption of the substitute for § 15, we think it appears plainly enough that Congress intended to deprive the Civil Service Commission of rulemaking power in the sense of exercising a subordinate legislative role in fashioning a more expansive definition of the kind of con-

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the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined *are at the time of the passage of this act* prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns." 86 Cong. Rec. 2937 (emphasis added).

After the substitute was introduced, *id.*, at 2928, Senator Hatch made a "slight modification," *id.*, at 2937, and added the phrase in italics above.

duct that would violate the prohibition against taking an active part in political management or political campaigns. But it is equally plain, we think, that Congress accepted the fact that the Commission had been performing its investigative and adjudicative role under Civil Service Rule I since 1907 and that the Commission had, on a case-by-case basis, fleshed out the meaning of Rule I and so developed a body of law with respect to what partisan conduct by federal employees was forbidden by the rule. 86 Cong. Rec. 2342, 2353. It is also apparent, in our view, that the rules that had evolved over the years from repeated adjudications were subject to sufficiently clear and summary statement for the guidance of the classified service. Many times during the debate on the floor of the Senate, Senator Hatch and others referred to a summary list of such prohibitions, see, *e. g.*, *id.*, at 2929, 2937–2938, 2942–2943, 2949, 2952–2953, the Senator's ultimate reference being to Civil Service Form No. 1236 of September 1939, the pertinent portion of which he placed in the Record, *id.*, at 2938–2940,[18] and which was the Commission's then-current effort to restate the prevailing prohibitions of Civil

[18] See Appendix to this opinion, *infra*, p. 581. Senator Hatch did not have Form 1236 with him on the floor during debate on § 15 and provided the pertinent portion from the Form for insertion into the Congressional Record after debate had been completed on the section. 86 Cong. Rec. 2938–2940. However, the Senator had provided the Senate with a card listing 18 rules which were described as the Civil Service Commission's construction of Civil Service Rule I, *id.*, at 2937–2938, 2943. The card, prepared by Senator Hatch with assistance from the Commission, was a summary of pertinent portions of Form 1236, *id.*, at 2937–2938, and was inserted into the Congressional Record, *id.*, at 2943. It provided:

"The pertinent language in section 9 is practically a duplication of the civil-service rule prohibiting political activity of employees under the classified civil service.

"The section provides in substance, among other things, that no

Service Rule I, as spelled out in its adjudications to that date. It was this administrative restatement of Civil Service Rule I law, modified to the extent necessary to reflect the provisions of the 1939 and 1940 Acts them-

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such officer or employee shall take any active part in political management or in political campaigns.

"The same language of the civil-service rule has been construed as follows:

"1. Rule prohibits participation not only in national politics but also in State, county, and municipal politics.

"2. Temporary employees, substitutes, and persons on furlough or leave of absence with or without pay are subject to the regulation.

"3. Whatever an official or employee may not do directly he may not do indirectly or through another.

"4. Candidacy for or service as delegate, alternate, or proxy in any political convention is prohibited.

"5. Service for or on any political committee is prohibited.

"6. Organizing or conducting political rallies or meetings or taking any part therein except as a spectator is prohibited.

"7. Employees may express their opinions on all subjects, but they may not make political speeches.

"8. Employees may vote as they please, but they must not solicit votes; mark ballots for others; help to get out votes; act as checkers. marker, or challenger for any party or engage in other activity at the poles [*sic*] except the casting of his own ballot.

"9. An employee may not serve as election official unless his failure or refusal so to do would be a violation of State laws.

"10. It is political activity for an employee to publish or be connected editorially, managerially, or financially with any political newspaper. An employee may not write for publication or publish any letter or article signed or unsigned in favor of or against any political party, candidate, or faction.

"11. Betting or wagering upon the results of a primary or general election is political activity.

"12. Organization or leadership of political parades is prohibited but marching in such parades is not prohibited.

"13. Among other forms of political activity which are prohibited are distribution of campaign literature, assuming political leadership, and becoming prominently identified with political move-

selves, that, in our view, Congress intended to serve as its definition of the general proscription against partisan activities.[19] It was within the limits of these rules that the Civil Service Commission was to proceed to perform its role under the statute.

Not only did Congress expect the Commission to continue its accustomed role with respect to federal employees, but also in § 12 (b) of the 1940 Act Congress expressly assigned the Commission the enforcement task with respect to state employees now covered by the Act.

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ments, parties, or factions or with the success or failure of supporting any candidate for public office.

"14. Candidacy for nomination or for the election to any National, State, county, or municipal office is within the prohibition.

"15. Attending conventions as spectators is permitted.

"16. An employee may attend a mass convention or caucus and cast his vote, but he may not pass this point.

"17. Membership in a political club is permitted, but employees may not be officers of the club nor act as such.

"18. Voluntary contributions to campaign committees and organizations are permitted. An employee may not solicit, collect, or receive contributions. Contributions by persons receiving remuneration from funds appropriated for relief purposes are not permitted."

[19] That § 15's incorporation of the Civil Service Commission restatement was intended to include only those Commission interpretations consistent with the Hatch Act is demonstrated by the following colloquy between Senators Hatch and Minton, 86 Cong. Rec. 2871:

"Mr. MINTON. The right to express political opinions has been defined by the Civil Service Commission to mean the private expression of such opinions.

"Mr. HATCH: Yes; the word 'privately' is in the rule of the Civil Service Commission. It is not in . . . [§ 9 of the Hatch Act].

"Mr. MINTON. The Civil Service Commission has defined the right to express political opinions as the right to do so privately.

"Mr. HATCH. Mr. President, that is because the word 'privately' is included in the rule of the Civil Service Commission. The word 'privately' is written into the rule. That is the word which I dropped out. I did it deliberately, intentionally, and I want it to remain out."

The Commission was to issue notice, hold hearings, adjudicate, and enforce. This process, inevitably and predictably, would entail further development of the law within the bounds of, and necessarily no more severe than, the 1940 rules and would be productive of a more refined definition of what conduct would or would not violate the statutory prohibition of taking an active part in political management and political campaigns.

It is thus not surprising that there were later editions of Form 1236,[20] or that in 1970 the Commission again purported to restate the law of forbidden political activity and, informed by years of intervening adjudications, again sought to define those acts which are forbidden and those which are permitted by the Hatch Act. These regulations, 5 CFR pt. 733, are wholly legitimate descendants of the 1940 restatement adopted by Congress and were arrived at by a process that Congress necessarily anticipated would occur down through the years. We accept them as the current and, in most respects, the longstanding interpretations of the statute by the agency charged with its interpretation and enforcement. It is to these regulations purporting to construe § 7324 as actually applied in practice, as well as to the statute itself, with its various exclusions, that we address ourselves in rejecting the claim that the Act is unconstitutionally vague and overbroad. *Law Students Research Council* v. *Wadmond,* 401 U. S. 154, 162–163 (1971); cf. *Gooding* v. *Wilson,* 405 U. S. 518, 520–521 (1972).

Whatever might be the difficulty with a provision against taking "active part in political management or in political campaigns," the Act specifically provides that the employee retains the right to vote as he chooses

[20] 1942, 1944, and 1966, the title being changed in the 1966 edition to Political Activity.

and to express his opinion on political subjects and candidates. The Act exempts research and educational activities supported by the District of Columbia or by religious, philanthropic, or cultural organizations, 5 U. S. C. § 7324 (c); and § 7326 exempts nonpartisan political activity: questions, that is, that are not identified with national or state political parties are not covered by the Act, including issues with respect to constitutional amendments, referendums, approval of municipal ordinances, and the like. Moreover, the plain import of the 1940 amendment to the Hatch Act is that the proscription against taking an active part in the proscribed activities is not open-ended but is limited to those rules and proscriptions that had been developed under Civil Service Rule I up to the date of the passage of the 1940 Act. Those rules, as refined by further adjudications within the outer limits of the 1940 rules, were restated by the Commission in 1970 in the form of regulations specifying the conduct that would be prohibited or permitted by § 7324 and its companion sections.

We have set out these regulations in the margin.[21] We

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[21] The pertinent regulations, appearing in 5 CFR pt. 733, provide:

"PERMISSIBLE ACTIVITIES

"§ 733.111 Permissible activities.

"(a) All employees are free to engage in political activity to the widest extent consistent with the restrictions imposed by law and this subpart. Each employee retains the right to—

"(1) Register and vote in any election;

"(2) Express his opinion as an individual privately and publicly on political subjects and candidates;

"(3) Display a political picture, sticker, badge, or button;

"(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;

"(5) Be a member of a political party or other political organiza-

see nothing impermissibly vague in 5 CFR § 733.122, which specifies in separate paragraphs the various activities deemed to be prohibited by § 7324 (a)(2). There

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tion and participate in its activities to the extent consistent with law;

"(6) Attend a political convention, rally, fund-raising function; or other political gathering;

"(7) Sign a political petition as an individual;

"(8) Make a financial contribution to a political party or organization;

"(9) Take an active part, as an independent candidate, or in support of an independent candidate, in a partisan election covered by § 733.124;

"(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

"(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

"(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

"(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency.

"(b) Paragraph (a) of this section does not authorize an employee to engage in political activity in violation of law, while on duty, or while in a uniform that identifies him as an employee. The head of an agency may prohibit or limit the participation of an employee or class of employees of his agency in an activity permitted by paragraph (a) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interests.

"PROHIBITED ACTIVITIES

"§ 733.121 Use of official authority; prohibition.

"An employee may not use his official authority or influence for the purpose of interfering with or affecting the result of an election.

"§ 733.122 Political management and political campaigning; prohibitions.

"(a) An employee may not take an active part in political man-

might be quibbles about the meaning of taking an "active part in managing" or about "actively participating in . . . fund-raising" or about the meaning of becoming a "partisan" candidate for office; but there are limitations in the English language with respect to being both spe-

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agement or in a political campaign, except as permitted by this subpart.

"(b) Activities prohibited by paragraph (a) of this section include but are not limited to—

"(1) Serving as an officer of a political party, a member of a National, State, or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

"(2) Organizing or reorganizing a political party organization or political club;

"(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose;

"(4) Organizing, selling tickets to, promoting, or actively participating in a fund-raising activity of a partisan candidate, political party, or political club;

"(5) Taking an active part in managing the political campaign of a partisan candidate for public office or political party office;

"(6) Becoming a partisan candidate for, or campaigning for, an elective public office;

"(7) Soliciting votes in support of or in opposition to a partisan candidate for public office or political party office;

"(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or partisan candidate;

"(9) Driving voters to the polls on behalf of a political party or partisan candidate;

"(10) Endorsing or opposing a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material;

"(11) Serving as a delegate, alternate, or proxy to a political party convention;

"(12) Addressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office; and

"(13) Initiating or circulating a partisan nominating petition."

cific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest. "[T]he general class of offenses to which . . . [the provisions are] directed is plainly within [their] terms, . . . [and they] will not be struck down as vague, even though marginal cases could be put where doubts might arise." *United States* v. *Harriss*, 347 U. S. 612, 618 (1954). Surely, there seemed to be little question in the minds of the plaintiffs who brought this lawsuit as to the meaning of the law, or as to whether or not the conduct in which they desire to engage was or was not prohibited by the Act.

The Act permits the individual employee to "express his opinion on political subjects and candidates," 5 U. S. C. § 7324 (b); and the corresponding regulation, 5 CFR § 733.111 (a)(2), privileges the employee to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." The section of the regulations which purports to state the partisan acts that are proscribed, *id.*, § 733.122, forbids in subparagraph (a)(10) the endorsement of "a partisan candidate for public office or political party office in a political advertisement, a broadcast, campaign literature, or similar material," and in subparagraph (a)(12), prohibits "[a]ddressing a convention, caucus, rally, or similar gathering of a political party in support of or in opposition to a partisan candidate for public office or political party office." Arguably, there are problems in meshing § 733.111 (a)(2) with §§ 733.122 (a)(10) and (12), but we think the latter prohibitions sufficiently clearly carve out the prohibited political conduct from the expressive activity permitted by the prior section to survive any

attack on the ground of vagueness or in the name of any of those policies that doctrine may be deemed to further.

It is also important in this respect that the Commission has established a procedure by which an employee in doubt about the validity of a proposed course of conduct may seek and obtain advice from the Commission and thereby remove any doubt there may be as to the meaning of the law, at least insofar as the Commission itself is concerned.[22]

Neither do we discern anything fatally overbroad about the statute when it is considered in connection with the Commission's construction of its terms represented by the 1970 regulations we now have before us. The major difficulties in this respect again relate to the prohibition in §§ 733.122 (a)(10) and (12) on endorsements in advertisements, broadcasts, and literature and on speaking at political party meetings in support of partisan candidates for public or party office. But these restrictions are clearly stated, they are political acts normally performed only in the context of partisan campaigns by one taking an active role in them, and they are sustainable for the same reasons that the other acts of political campaigning are constitutionally proscribable. They do not, therefore, render the remainder of the statute vulnerable by reason of overbreadth.

Even if the provisions forbidding partisan campaign endorsements and speechmaking were to be considered in some respects unconstitutionally overbroad, we would not invalidate the entire statute as the District Court did. The remainder of the statute, as we have said,

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[22] According to an affidavit filed in District Court by the General Counsel for the Civil Service Commission, App. 54:

"The Information Unit [in the Office of General Counsel] answers inquiries, from whatever source, concerning the application of the Hatch Act, Rule, and regulations."

covers a whole range of easily identifiable and constitutionally proscribable partisan conduct on the part of federal employees, and the extent to which pure expression is impermissibly threatened, if at all, by §§ 733.122 (a) (10) and (12), does not in our view make the statute substantially overbroad and so invalid on its face. *Broadrick* v. *Oklahoma, post,* p. 601.

For the foregoing reasons, the judgment of the District Court is reversed.

So ordered.

APPENDIX TO OPINION OF THE COURT

That portion of the United States Civil Service Commission Form 1236, Political Activity and Assessments, September 1939, as inserted into the Congressional Record by Senator Hatch, 86 Cong. Rec. 2938–2940, provided:

III. PARTICULAR TYPES OF PROHIBITED ACTIVITIES

11. As has been pointed out, it is impossible to make a complete enumeration of all the particular types of political activities in which Government employees may not engage. The general scope of the political-activity rule has been defined in section 2 above. In the following sections some of the types of political activity which occur more frequently are discussed in detail.

12. Activity by indirection: Any political activity which is prohibited in the case of an employee acting independently is also prohibited in the case of an employee acting in open or secret cooperation with others. Whatever the employee may not do directly or personally, he may not do indirectly or through an agent, officer, or employee chosen by him or subject to his control. Employees are therefore accountable for political activity by persons other than themselves, including

wives or husbands, if, in fact, the employees are thus accomplishing by collusion and indirection what they may not lawfully do directly and openly. Political activity in fact, regardless of the methods or means used by the employee, constitutes the violation.

This does not mean that an employee's husband or wife may not engage in politics independently, upon his or her own initiative, and in his or her own behalf. Cases have arisen, however, in which the facts showed that the real purpose of a wife's activity was to accomplish a political act prohibited to her husband, the attempt being made for her husband's benefit and at his instigation or even upon his coercion. This may be true of individuals or it may occur among groups of employees' wives, associated for the purpose of securing for their husbands what their husbands may not secure for themselves. In such situations it is obvious that the prohibitions against political activity are being indirectly violated. The collusion or coercion renders the wife's activity imputable to the husband, he being guilty of the same infraction as if he were openly a participant.

13. Conventions: Candidacy for or service as delegate, alternate, or proxy in any political convention or service as an officer or employee thereof is prohibited. Attendance merely as a spectator is permissible, but the employee so attending must not take any part in the convention or in the deliberations or proceedings of any of its committees, and must refrain from any public display of partisanship or obtrusive demonstration or interference. (See secs. 4 and 19.)

14. Primaries—caucuses: An employee may attend a primary meeting, mass convention, beat convention, caucus, and the like, and may cast his vote on any question presented, but he may not pass this point in participating in its deliberations. He may not act as an officer of the meeting, convention, or caucus, may not address it, make

motions, prepare or assist in preparing resolutions, assume to represent others, or take any prominent part therein.

15. Committees: Service on or for any political committee or similar organization is prohibited. An employee may attend as a spectator any meeting of a political committee to which the general public is admitted, but must refrain from activity as indicated in the preceding paragraphs.

Whether a committee has an ultimate political purpose determines whether a classified employee may properly serve as a member. Assignment may be to duties which, if considered alone, would seem far removed from active politics, but which, when considered as a part of the whole purpose, assume an active political character. No attempt can be made to differentiate between workers on or under political committees with respect to the degree to which they are politically active.

16. Clubs and organizations: Employees may be members of political clubs, but it is improper for them to be active in organizing such a club, to be officers of the club, or members or officers of any of its committees or to act as such, or to address a political club. Service as a delegate from such a club to a league of political clubs is service as an officer or representative of a political club and is prohibited, as is service as a delegate or representative of such a club to or in any other organization. In other words, an employee may become a member of a political club, but may not take an active part in its management or affairs, and may not represent other members or attempt to influence them by his actions or utterances. (See secs. 4 and 19.)

Section 6 of the act of August 24, 1912 (37 Stat. 555), provides in part—

"That membership in any society, association, club, or other form of organization of postal employees not affil-

iated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said Postal Service, or the presenting by any such person or groups of persons of any grievance or grievances to the Congress or any Member thereof, shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service."

Section 9A of the act of August 2, 1939 (Public, No. 252, 76th Cong.), provides as follows:

"(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

"(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person."

17. Contributions: An employee may make political contributions to any committee, organization, or person not employed by the United States, but may not solicit, collect, receive, or otherwise handle or disburse the contributions. (See provisions of the Criminal Code, discussed in secs. 36 to 50.)

18. Meetings: Service in preparing for, organizing, or conducting a political meeting or rally, addressing such

a meeting, or taking any part therein, except as a spectator, is prohibited.

19. Expression of opinions: Although section 9 (a) of the act of August 2, 1939 reserves to Federal officers and employees the right to express their opinions on all political subjects, officers and employees in the competitive classified service are subject also to section 1 of civil-service rule I, under which such employees must confine themselves to a private expression of opinion. Nonclassified and excepted employees may not indulge in such public expression of opinion as constitutes taking part in an organized political campaign. (See foregoing secs. 1 and 4.)

20. Activity at the polls and for candidates: An employee has the right to vote as he pleases, and to exercise this right free from interference, solicitation, or dictation by any fellow employee or superior officer or any other person. It is a violation of the Federal Corrupt Practices Act to pay or offer to pay any person for voting or refraining from voting, or for voting for or against any candidate for Senator or Representative in, or Delegate or Resident Commissioner to, Congress. It is also a violation of the law to solicit, receive, or accept payment for one's vote or for withholding one's vote. (See U. S. Code, title 2, sec. 250.)

Under the act of August 2, 1939, it is a criminal offense for any person to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote as he may choose in any election of a national character. It is also a criminal offense to promise any employment, position, work, or compensation, or other benefit made possible by an act of Congress, as a consideration, favor, or reward for political activity or for the support of or opposition to any political candidate or party. (See secs. 48 and 50 herein.)

It is the duty of an employee to avoid any offensive activity at primary and regular elections. He must refrain from soliciting votes, assisting voters to mark ballots, helping to get out the voters on registration and election days, acting as the accredited checker, watcher, or challenger of any party or faction, assisting in counting the vote, or engaging in any other activity at the polls except the marking and depositing of his own ballot. Rendering service, such as transporting voters to and from the polls and candidates on canvassing tours, whether for pay or gratuitously, is held to be within the scope of political activities prohibited by the rule, even if such service is performed without regard to political party.

21. Election officers: Service as judge of election, inspector, checker, teller, or as election officer of any kind is prohibited.

22. Newspapers—publication of letters or articles: A classified employee may not publish or be connected editorially or managerially with any political newspaper, and may not write for publication or publish any letter or article, signed or unsigned, in favor of or against any political party, candidate, faction, or measure. An employee who writes such a letter or article is responsible for any use that may be made of it whether or not he gives consent to such use. (See secs. 4 and 19.)

23. Liquor question: Activity in campaigns concerning the regulation or suppression of the liquor traffic is prohibited. An employee may be a member but not an officer of a club, league, or other organization which takes part in such a campaign. The dissemination of temperance propaganda is permissible, but any endeavor for or against the regulation, control, or suppression of the liquor traffic through political agencies is prohibited.

24. Betting or wagering on elections: Betting or wagering upon the results of primary and general elections is penalized by the laws of most States and is improper political activity.

25. Activity in civic organizations and citizens' associations: Activity in organizations having for their primary object the promotion of good government or the local civic welfare is not prohibited by the act of August 2, 1939, or civil-service rule I, provided such activities have no connection with the campaigns of particular candidates or parties.

26. Parades: An employee may not march in a political parade, organize, or be an officer or leader of such a parade.

A Government employee may not take part in the activities of a musical organization in any parade or other activity of a political party.

27. Signing petitions: The first amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 6 of the act of August 24, 1912 (37 Stat. 555), provides that "the right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or Member thereof, shall not be denied or interfered with."

The right guaranteed by the Constitution and the statute extends only to petitions addressed to the Government, or to Congress or Members thereof. It does not extend to petitions addressed to State, county, or

municipal governments, or to other political units. A classified employee is permitted to sign petitions of the latter class as an individual, without reference to his connection with the Government, but he may not initiate them, circulate them, or canvass for the signatures of others.

28. Applying for Presidential positions not in the classified service: [1] When a classified employee seeks promotion by appointment or transfer to a Presidential office not in the classified service there is no objection to his becoming a candidate for such an office, provided the consent of his department is obtained, and provided he does not violate section 1 of rule I, prohibiting the use of his official authority or influence in political matters, and provided further that he does not neglect his duty and avoids any action that would cause public scandal or semblance of coercion of his fellow employees or of those over whom he desires to be placed in the position he seeks.

A classified employee may circulate a petition or seek endorsements for his own appointment to a Presidential position, subject to the qualifications above stated, and he may, as an individual, sign a petition or recommend another person for such an appointment; but he may not circulate a petition or solicit endorsements, recommendations, or support for the appointment of another person to such a position, whether such other person is a fellow employee or one not at the time in the Government service.

When an unofficial primary or election is held for the purpose of determining the popular choice for the Presidential office, a classified employee may permit his

[1] Appointment is made by the President by and with the advice and consent of the Senate to postmaster positions of the first, second and third classes, but these positions are in the competitive classified service under the act of June 25, 1938.

name to appear upon the ticket, but he may not solicit votes in his behalf at such a primary or election, or in any manner violate section 1 of rule I. He may vote and express privately his opinions, but may not solicit votes or publicly advocate the candidacy or election of himself or any other person. Although it is permissible for a classified employee, as an individual, to sign a petition or recommend another person for appointment to a nonclassified position, he is not permitted to sign such a petition as a Government employee or in any other way to use his official authority or influence to advance the candidacy of any person for election or appointment to any office. Classified employees are permitted to exercise the right as individuals to sign a petition favoring a candidate for any office, but they may not do so as Government employees or as a group or association of Government employees.

29. Other forms of political activity: Among other forms of political activity which are prohibited are the distribution of campaign literature, badges, or buttons, and assuming general political leadership or becoming prominently identified with any political movement, party, or faction, or with the success or failure of any candidate for election to public office.

IV. CANDIDACY FOR OR HOLDING LOCAL OFFICE—CLASSIFIED AND NONCLASSIFIED EMPLOYEES

30. Candidacy for local office: Candidacy for a nomination or for election to any National, State, county, or municipal office is not permissible. The prohibition against political activity extends not merely to formal announcement of candidacy but also to the preliminaries leading to such announcement and to canvassing or soliciting support or doing or permitting to be done any act in furtherance of candidacy. The fact that candidacy,

is merely passive is immaterial; if an employee acquiesces in the efforts of friends in furtherance of such candidacy such acquiescence constitutes an infraction of the prohibitions against political activity.

31. Federal employees holding local office: [2] Persons holding Federal civil office by appointment, whether in the competitive classified service or not, are prohibited from accepting or holding any office under a State, Territorial, or municipal government by an Executive order of January 17, 1873, which is as follows:

"Whereas it has been brought to the notice of the President of the United States that many persons holding civil office by appointment from him or otherwise under the Constitution and laws of the United States while holding such Federal positions accept offices under the authority of the States and Territories in which they reside, or of municipal corporations, under the charters and ordinances of such corporations, thereby assuming the duties of the State, Territorial, or municipal office at the same time that they are charged with the duties of the civil office held under Federal authority:

"And whereas it is believed that, with but few exceptions, the holding of two such offices by the same person is incompatible with a due and faithful discharge of the duties of either office; that it frequently gives rise to great inconvenience, and often results in detriment to the public service; and, moreover, is not in harmony with the genius of the Government:

"In view of the premises, therefore, the President has deemed it proper thus and hereby to give public notice that, from and after the 4th day of March A. D. 1873 (except as herein specified), persons holding any Federal civil office by appointment under the Constitution and laws of the United States will be expected, while holding

[2] See sec. 35.

such office, not to accept or hold any office under any State or Territorial government, or under the charter or ordinances of any municipal corporation; and, further, that the acceptance or continued holding of any such State, Territorial, or municipal office, whether elective or by appointment, by any person holding civil office as aforesaid under the Government of the United States, other than judicial offices under the Constitution of the United States, will be deemed a vacation of the Federal office held by such person, and will be taken to be and will be treated as a resignation by such Federal officer of his commission or appointment in the service of the United States.

"The offices of justices of the peace, of notaries public, and of commissioners to take the acknowledgment of deeds, of bail, or to administer oaths, shall not be deemed within the purview of this order and are excepted from its operation, and may be held by Federal officers.

"The appointment of deputy marshals of the United States may be conferred upon sheriffs or deputy sheriffs. Any deputy postmasters, the emoluments of whose office do not exceed $600 per annum, are also excepted from the operation of this order and may accept and hold appointments under State, Territorial, or municipal authority, provided the same be found not to interfere with the discharge of their duties as postmasters.[3] Heads of departments and other officers of the Government who have the appointment of subordinate officers are required to take notice of this order, and to see to the enforcement of its provisions and terms within the sphere of their respective departments or offices and as relates to the several persons holding appointments under them, respectively." [4]

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[3] See sec. 8.

[4] A Federal employee who resigns at the expiration of his accrued

32. Interpretation of the order of January 17, 1873: An Executive order of January 28, 1873, as amended by Executive order of August 27, 1933, is as follows:

"Inquiries having been made from various quarters as to the application of the Executive order issued on the 17th of January relating to the holding of State or municipal offices by persons holding civil offices under the Federal Government, the President directs the following reply to be made:

"It has been asked whether the order prohibits a Federal officer from holding also the office of an alderman or of a common councilman in a city, or of a town councilman of a town or village, or of appointments under city, town, or village governments. By some it has been suggested that there may be distinction made in case the office be with or without salary or compensation. The city or town offices of the description referred to, by whatever names they may be locally known, whether held by election or by appointment, and whether with or without salary or compensation, are of the class which the Executive order intends not to be held by persons holding Federal offices.

"It has been asked whether the order prohibits Federal officers from holding positions on boards of education, school committees, public libraries, religious or eleemosynary institutions incorporated or established or sustained by State or municipal authority. Positions and service on such boards and committees, and professorships in colleges [5] are not regarded as 'offices' within the contemplation of the Executive order, but as employments

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leave may accept a State or municipal position after his last day of active Federal service (16 Comp. Gen. 776, Feb. 19, 1937).

[5] Includes assistant professorships in a State college, assistant lectureships in an evening school of a municipal university, instructorships in a State college, and similar positions in State and municipal colleges and universities. (Minutes of Commission, August 7, 1937.)

or service in which all good citizens may be engaged without incompatibility and in many cases without necessary interference with any position which they may hold under the Federal Government. Officers of the Federal Government may therefore engage in such service, provided the attention required by such employment does not interfere with the regular and efficient discharge of the duties of their office under the Federal Government. The head of the department under whom the Federal office is held will in all cases be the sole judge whether or not the employment does thus interfere.

"The question has also been asked with regard to officers of the State militia. Congress having exercised the power conferred by the Constitution to provide for organizing the militia, which is liable to be called forth to be employed in the service of the United States, and is thus, in some sense, under the control of the General Government, and is, moreover, of the greatest value to the public, the Executive order of the 17th January is not considered as prohibiting Federal officers from being officers in the militia in the States and Territories.

"It has been asked whether the order prohibits persons holding office under the Federal Government being members of local or municipal fire departments, also whether it applies to mechanics employed by the day in the armories, arsenals, and navy yards, etc., of the United States. Unpaid service in local or municipal fire departments is not regarded as an office within the intent of the Executive order, and may be performed by Federal officers, provided it does not interfere with the regular and efficient discharge of the duties of the Federal office, of which the head of the department under which the office is held will in each case be the judge.

"Mechanics and laborers employed by the day in armories, arsenals, navy yards, etc., and master workmen and others who hold appointments from the Government

or from any department, whether for a fixed time or at the pleasure of the appointing power, are embraced within the operation of the order."

33. Eligibles holding local office: Eligibles who are holding a local office not excepted from the prohibitions of the order of January 17, 1873, on selection for and acceptance of any position in the competitive classified service or of unclassified laborer must immediately resign the local office. Such resignation must be effected whether the service in the local office is compensated or uncompensated or whether the employee is on active duty or leave without pay. The holding of a local office not excepted from the prohibitions of the order of January 17, 1873, is an absolute disqualification for appointment, and unless persons otherwise eligible for appointment are willing immediately to resign the local office in the event of selection for appointment, their appointments cannot be approved.

34. Minor local offices which may be held by Government officers and employees: Although the Executive orders of January 17 and January 28, 1873, prohibit generally any person holding Federal civil office by appointment, from accepting or holding an office under a State, Territorial, or municipal government, certain offices of a minor character are excepted from this general prohibition. Among these are positions of justice of the peace; notary public; commissioner to take acknowledgement of deeds, of bail, or to administer oaths; positions on boards of education, school committees, public libraries, and in religious or eleemosynary institutions. In addition, Federal employees are, under certain conditions, permitted to hold other local offices under authority of the Executive orders set forth in section 35. The permission to hold local offices granted by these Executive orders, however, is now subject to the general prohibition of section 9 of the act of August 2, 1939 (see sec. 1),

against participation in political management and in political campaigns by Federal employees.

In view of the broad language of section 9 of the act of August 2, 1939, the incumbency by a Federal employee of any elective office whatever under a State, Territorial, or municipal government is prohibited, regardless of whether or not the office is of such character that its incumbency was permitted by Executive order prior to the enactment of the act. The incumbency by a Federal employee of an appointive office under a State, Territorial, or municipal government is permissible, provided such incumbency is specifically authorized by some statute or Executive order. In securing such offices, however, and in the discharge of the duties thereof, Federal employees must not engage in political management.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

The Hatch Act by § 9 (a) prohibits federal employees from taking "an active part in political management or in political campaigns." Some of the employees, whose union is speaking for them, want

> "to run in state and local elections for the school board, for city council, for mayor";
>
> "to write letters on political subjects to newspapers";
>
> "to be a delegate in a political convention";
>
> "to run for an office and hold office in a political party or political club";
>
> "to campaign for candidates for political office";
>
> "to work at polling places in behalf of a political party."

There is no definition of what "an active part . . . in political campaigns" means. The Act incorporates over 3,000 rulings of the Civil Service Commission between

1886 and 1940 and many hundreds of rulings since 1940. But even with that gloss on the Act, the critical phrases lack precision. In 1971 the Commission published a three-volume work entitled Political Activities Reporter which contains over 800 of its decisions since the enactment of the Hatch Act. One can learn from studying those volumes that it is not "political activity" to march in a band during a political parade or to wear political badges or to "participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his agency." 5 CFR § 733.111 (a)(13).

That is to say, some things, like marching in a band, are clear. Others are pregnant with ambiguity as "participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise," etc. Permission to "[t]ake an active part . . . in a nonpartisan election," 5 CFR § 733.111 (a)(10), also raises large questions of uncertainty because one may be partisan for a person, an issue, a candidate without feeling an identification with one political party or the other.

The District Court felt that the prohibitions in the Act are "worded in generalities that lack precision," 346 F. Supp. 578, 582, with the result that it is hazardous for an employee "if he ventures to speak on a political matter since he will not know when his words or acts relating to political subjects will offend." *Id.*, at 582–583.

The chilling effect of these vague and generalized prohibitions is so obvious as not to need elaboration. That effect would not be material to the issue of constitutionality if only the normal contours of the police power were involved. On the run of social and economic matters the "rational basis" standard which *United Public*

Workers v. *Mitchell*, 330 U. S. 75, applied would suffice.[1] But what may have been unclear to some in *Mitchell* should by now be abundantly clear to all. We deal here with a First Amendment right to speak, to propose, to publish, to petition Government, to assemble. Time and place are obvious limitations. Thus no one could object if employees were barred from using office time to engage in outside activities whether political or otherwise. But it is of no concern of Government what an employee does in his spare time, whether religion, recreation, social work, or politics is his hobby—unless what he does impairs efficiency or other facets of the merits of his job. Some things, some activities do affect or may be thought to affect the employee's job performance. But his political creed, like his religion, is irrelevant. In the areas of speech, like religion, it is of no concern what the employee says in private to his wife or to the public in Constitution Hall. If Government employment were only a "privilege," then all sorts of conditions might be attached. But it is now settled that Government employment may not be denied or penalized "on a basis that infringes [the employee's] constitutionally protected interests—especially, his interest in freedom of speech." See *Perry* v. *Sindermann*, 408 U. S. 593, 597. If Government, as the majority stated in *Mitchell*, may not condition public employment on the basis that the employee will not "take any active part in missionary work," 330 U. S., at 100, it is difficult to see why it may condition employment on the basis that the employee not take "an active part . . . in political campaigns."

[1] "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere wth the efficiency of the public service." *United Public Workers* v. *Mitchell*, 330 U. S. 75, 101.

For speech, assembly, and petition are as deeply embedded in the First Amendment as proselytizing a religious cause.

Free discussion of governmental affairs is basic in our constitutional system. *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250; *Mills* v. *Alabama,* 384 U. S. 214, 218; *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265, 272. Laws that trench on that area must be narrowly and precisely drawn to deal with precise ends. Overbreadth in the area of the First Amendment has a peculiar evil, the evil of creating chilling effects which deter the exercise of those freedoms. *Dombrowski* v. *Pfister,* 380 U. S. 479, 486. As we stated in *NAACP* v. *Button,* 371 U. S. 415, 433, in speaking of First Amendment freedoms and the unconstitutionality of overbroad statutes: "These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions."

Mitchell is of a different vintage from the present case. Since its date, a host of decisions have illustrated the need for narrowly drawn statutes that touch First Amendment rights. A teacher was held to be unconstitutionally discharged for sending a letter to a newspaper that criticized the school authorities. *Pickering* v. *Board of Education,* 391 U. S. 563, 573. "In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public." We followed the same course in *Wood* v. *Georgia,* 370 U. S. 375, when we relieved a sheriff from a contempt conviction for making a public statement in connection with a current political controversy. As in the present case, the sheriff spoke as a

private citizen and what he said did not interfere with his duties as sheriff. *Id.*, at 393–394.

The present Act cannot be appropriately narrowed to meet the need for narrowly drawn language not embracing First Amendment speech or writing without substantial revision. That rewriting cannot be done by the Commission because Congress refused to delegate to it authority to regulate First Amendment rights. The proposal to do so aroused a great debate in Congress [2] and Senator Hatch finally submitted a substitute, saying "[i]t does away with the question of the delegation of power." [3]

The Commission, on a case-by-case approach, has listed 13 categories of prohibited activities, 5 CFR § 733.122 (b), starting with the catch-all "include but are not limited to." So the Commission ends up with open-end discretion to penalize X or not to penalize him. For example, a "permissible" activity is the employee's right to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates." 5 CFR § 733.111 (a)(2). Yet "soliciting votes" is prohibited. 5 CFR § 733.122 (b)(7). Is an employee safe from punishment if he expresses his opinion that candidate X is the best

[2] S. 3046, as reported by the Senate Committee on Privileges and Elections, authorized "the Civil Service Commission to define the term 'active part in political management or in political campaigns' as that term is used in the prohibitions applicable to Federal employees and in the prohibitions applicable to State and local officers and employees." S. Rep. No. 1236, 76th Cong., 3d Sess., 2. The Senate was reluctant to leave the task of defining these terms "to some bureaucratic board which has absolutely no knowledge of political conditions and circumstances in any section of the country." 86 Cong. Rec. 2427 (remarks of Sen. Lucas). The section also was challenged as an unconstitutional delegation of legislative authority. *Id.*, at 2579 (remarks of Sen. Brown and Sen. McKellar). Others were concerned with problems of fairness. *Id.*, at 2720 (Sen. Bankhead).

[3] *Id.*, at 2928.

and candidate Y the worst? Is that crossing the forbidden line of soliciting votes?

A nursing assistant at a veterans' hospital put an ad in a newspaper reading:

> "To All My Many Friends of Poplar Bluff and Butler County I want to take this opportunity to ask your vote and support in the election, TUESDAY, AUGUST 7th. A very special person is seeking the Democratic nomination for Sheriff. I do not have to tell you of his qualifications, his past records stand.
>
> "This person is my dad, Lester (Less) Massingham.
>
> "THANK YOU
>
> "WALLACE (WALLY) MASSINGHAM"

He was held to have violated the Act. *Massingham,* 1 Political Activity Reporter 792, 793 (1959).

Is a letter a permissible "expression" of views or a prohibited "solicitation?" The Solicitor General says it is a "permissible" expression; but the Commission ruled otherwise. For an employee who does not have the Solicitor General as counsel great consequences flow from an innocent decision. He may lose his job. Therefore the most prudent thing is to do nothing. Thus is self-imposed censorship imposed on many nervous people who live on narrow economic margins.

I would strike this provision of the law down as unconstitutional so that a new start may be made on this old problem that confuses and restricts nearly five million federal, state, and local public employees today that live under the present Act.

BROADRICK ET AL. *v.* OKLAHOMA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 71-1639. Argued March 26, 1973—Decided June 25, 1973

Appellants, state employees charged by the Oklahoma State Personnel Board with actively engaging in partisan political activities (including the solicitation of money) among their coworkers for the benefit of their superior, in alleged violation of § 818 of the state merit system Act, brought this suit challenging the Act's validity on the grounds that two of its paragraphs are invalid because of overbreadth and vagueness. One paragraph provides that no classified service employee "shall directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment . . . or contribution for any political organization, candidacy or other political purpose." The other provides that no such employee shall belong to "any national, state or local committee of a political party" or be an officer or member of a committee or a partisan political club, or a candidate for any paid public office, or take part in the management or affairs of any political party or campaign "except to exercise his right as a citizen privately to express his opinion and . . . vote." The District Court upheld the provisions. *Held:* Section 818 of the Oklahoma statute is not unconstitutional on its face. *CSC* v. *Letter Carriers, ante,* p. 548. Pp. 607-618.

(a) The statute, which gives adequate warning of what activities it proscribes and sets forth explicit standards for those who must apply it, is not impermissibly vague. Pp. 607-608.

(b) Although appellants contend that the statute reaches activities that are constitutionally protected as well as those that are not, it is clearly constitutional as applied to the conduct with which they are charged and because it is not substantially overbroad they cannot challenge the statute on the ground that it might be applied unconstitutionally to others, in situations not before the Court. Appellants' conduct falls squarely within the proscriptions of § 818, which deals with activities that the State has ample power to regulate, *United Public Workers* v. *Mitchell,* 330 U. S. 75;

CSC v. *Letter Carriers, supra,* and the operation of the statute has been administratively confined to clearly partisan political activity. Pp. 609–618.

338 F. Supp. 711, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post,* p. 618. BRENNAN, J., filed a dissenting opinion, in which STEWART and MARSHALL, JJ., joined, *post,* p. 621.

John C. Buckingham argued the cause for appellants. With him on the briefs was *Terry Shipley.*

Mike D. Martin, Assistant Attorney General of Oklahoma, argued the cause for appellees. With him on the brief were *Larry Derryberry,* Attorney General, and *Paul C. Duncan,* Assistant Attorney General.

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 818 of Oklahoma's Merit System of Personnel Administration Act, Okla. Stat. Ann., Tit. 74, § 801 *et seq.,* restricts the political activities of the State's classified civil servants in much the same manner that the Hatch Act proscribes partisan political activities of federal employees. Three employees of the Oklahoma Corporation Commission who are subject to the proscriptions of § 818 seek to have two of its paragraphs declared unconstitutional on their face and enjoined because of asserted vagueness and overbreadth. After a hearing, the District Court upheld the provisions and denied relief. 338 F. Supp. 711. We noted probable jurisdiction of the appeal, 409 U. S. 1058, so that appellants' claims could be considered together with those of their federal counterparts in *CSC* v. *Letter Carriers, ante,* p. 548. We affirm the judgment of the District Court.

Section 818 was enacted in 1959 when the State first established its Merit System of Personnel Administration.[1] The section serves roughly the same function as

[1] The section reads as follows:

"[1] No person in the classified service shall be appointed to, or demoted or dismissed from any position in the classified service, or in any way favored or discriminated against with respect to employment in the classified service because of his political or religious opinions or affiliations, or because of race, creed, color or national origin or by reason of any physical handicap so long as the physical handicap does not prevent or render the employee less able to do the work for which he is employed.

"[2] No person shall use or promise to use, directly or indirectly, any official authority or influence, whether possessed or anticipated, to secure or attempt to secure for any person an appointment or advantage in appointment to a position in the classified service, or an increase in pay or other advantage in employment in any such position, for the purpose of influencing the vote or political action of any person, or for consideration; provided, however, that letters of inquiry, recommendation and reference by public employees of public officials shall not be considered official authority or influence unless such letter contains a threat, intimidation, irrelevant, derogatory or false information.

"[3] No person shall make any false statement, certificate, mark, rating, or report with regard to any test, certification or appointment made under any provision of this Act or in any manner commit any fraud preventing the impartial execution of this Act and rules made hereunder.

"[4] No employee of the department, examiner, or other person shall defeat, deceive, or obstruct any person in his or her right to examination, eligibility, certification, or appointment under this law, or furnish to any person any special or secret information for the purpose of effecting [*sic*] the rights or prospects of any person with respect to employment in the classified service.

"[5] No person shall, directly or indirectly, give, render, pay, offer, solicit, or accept any money, service, or other valuable consideration for or on account of any appointment, proposed appointment, promotion, or proposed promotion to, or any advantage in, a position in the classified service.

"[6] No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in

the analogous provisions of the other 49 States,[2] and is patterned on § 9 (a) of the Hatch Act.[3] Without question, a broad range of political activities and con-

any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

"[7] No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

"[8] Upon a showing of substantial evidence by the Personnel Director that any officer or employee in the state classified service, has knowingly violated any of the provisions of this Section, the State Personnel Board shall notify the officer or employee so charged and the appointing authority under whose jurisdiction the officer or employee serves. If the officer or employee so desires, the State Personnel Board shall hold a public hearing, or shall authorize the Personnel Director to hold a public hearing, and submit a transcript thereof, together with a recommendation, to the State Personnel Board. Relevant witnesses shall be allowed to be present and testify at such hearings. If the officer or employee shall be found guilty by the State Personnel Board of the violation of any provision of this Section, the Board shall direct the appointing authority to dismiss such officer or employee; and the appointing authority so directed shall comply." Okla. Stat. Ann., Tit. 74, § 818 (1965) (paragraph enumeration added).

[2] See Ala. Code, Tit. 55, § 317 (1958); Alaska Stat. § 39.25.160 (1962); Ariz. Rev. Stat. Ann. § 16–1301 (1956), Merit System Regulations and Merit System Board Procedures § 1511 (1966); Ark. Stat. Ann. § 83–119 (1947); Cal. Govt. Code §§ 19730–19735 (1963 and Supp. 1973); Colo. Rev. Stat. Ann. § 26–5–31 (1963), Civil Service Comm'n Rules and Regulations, Art. XIV, § 1; Conn. Gen. Stat. Rev. § 5–266 (Supp. 1969), Regulations of the Civil Service Comm'n Concerning Employees in the State Classified Service § 14–13; Del.

[*Footnote 3 is on p. 605*]

duct is proscribed by the section. Paragraph six, one of the contested portions, provides that "[n]o employee in the classified service . . . shall, directly or indirectly,

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Code Ann., Tit. 31, § 110 (1953); Fla. Stat. Ann. § 110.092 (1973); Ga. Merit System of Personnel Administration, Rules and Regulations, Rule 3, ¶¶ 3.101–3.106; Hawaii Rev. Stat. §§ 76–1, 76–91 (1968); Idaho Code § 67–5311 (1973); Ill. Rev. Stat., c. 24½, § 38t (1971); Ind. Ann. Stat. § 60–1341 (1962); Iowa Code Ann. § 19A.18 (Supp. 1973); Kan. Stat. Ann. § 75–2953 (1969); Ky. Rev. Stat. Ann. § 18.310 (1971); La. Const., Art. 14, § 15 (N) (1955); Me. Rev. Stat. Ann., Tit. 5, § 679 (1964); Md. Merit System Rules for Grant-in-Aid Agencies § 602.2; Mass. Gen. Laws Ann., c. 55, §§ 1–15, c. 56, §§ 35–36 (1958 and Supp. 1973); Mich. Rules of Civil Service Comm'n § 7 (1965); Minn. Stat. Ann. § 43.28 (1970); Miss. Merit System Rules, Dept. of Public Welfare, Art. XVI (1965); Mo. Ann. Stat. § 36.150 (1969); Mont. Rev. Codes Ann. §§ 94–1439, 94–1440, 94–1447, 94–1476 (1947); Neb. Rev. Stat. § 81–1315 (1971), Neb. Joint Merit System Regulations for a Merit System, Art. XVI (1963); Nev. Rules for State Personnel Administration, Rules XVI, XIII (1963); N. H. Rev. Stat. Ann. §§ 98:18, 98:19 (1964); N. J. Stat. Ann. § 11:17–2 (1960); N. M. Stat. Ann. § 5–4–42 (1953 and Supp. 1971); N. Y. Civ. Serv. Law § 107 (1973); N. C. Gen. Stat. §§ 126–13 to 126–15 (Supp. 1971); Rules and Regulations of N. D. Merit Systems, Art. XVI; Ohio Rev. Code Ann. §§ 143.41, 143.44, 143.45, 143.46 (1969); Ore. Rev. Stat. § 260.432 (1971); Pa. Stat. Ann., Tit. 71, § 741.904 (Supp. 1973–1974); R. I. Gen. Laws Ann. §§ 36–4–51 to 36–4–53 (1969); S. C. Merit System Rules and Regulations, Civil Defense Council, Art. XIV, § 1; S. D. Merit System Regulations, Art. XVI, § 1 (1963); Tenn. Code Ann. § 8–3121 (Supp. 1971), Tenn. Rules and Regulations for Administering the Civil Service Act § 2.3 (1963); Tex. Penal Code, Arts. 195–197 (1952); Utah Code Ann. § 67–13–13 (1968); Vt. Rules and Regulations for Personnel Administration § 3.02; Va. Supp. to Rules for the Administration of the Va. Personnel Act, Rule 15.14 (A); Wash. Rev. Code Ann. § 41–06–250 (1969); W. Va. Code Ann. § 29–6–19 (1971); Wis. Stat. Ann. § 16.30 (1972); Wyo. Rev. Rules and Regulations, Rule XIII (1960). (For compilation of state rules and regulations, see 2 Commission on Political Activity of Government Personnel, Research 122 *et seq.* (1967).)

[3] 5 U. S. C. § 7324 (a). See generally *CSC* v. *Letter Carriers*, *ante*, p. 548.

solicit, receive, or in any manner be concerned in soliciting or receiving any assessment . . . or contribution for any political organization, candidacy or other political purpose." Paragraph seven, the other challenged paragraph, provides that no such employee "shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office." That paragraph further prohibits such employees from "tak[ing] part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote." As a complementary proscription (not challenged in this lawsuit) the first paragraph prohibits any person from "in any way" being "favored or discriminated against with respect to employment in the classified service because of his political . . . opinions or affiliations." Responsibility for maintaining and enforcing § 818's proscriptions is vested in the State Personnel Board and the State Personnel Director, who is appointed by the Board. Violation of § 818 results in dismissal from employment and possible criminal sanctions and limited state employment ineligibility. Okla. Stat. Ann., Tit. 74, §§ 818 and 819.

Appellants do not question Oklahoma's right to place even-handed restrictions on the partisan political conduct of state employees. Appellants freely concede that such restrictions serve valid and important state interests, particularly with respect to attracting greater numbers of qualified people by insuring their job security, free from the vicissitudes of the elective process, and by protecting them from "political extortion." [4] See *United Public Workers* v. *Mitchell*, 330 U. S. 75, 99–103 (1947). Rather, appellants maintain that however permissible,

[4] Brief for Appellants 22.

even commendable, the goals of § 818 may be, its language is unconstitutionally vague and its prohibitions too broad in their sweep, failing to distinguish between conduct that may be proscribed and conduct that must be permitted. For these and other reasons,[5] appellants assert that the sixth and seventh paragraphs of § 818 are void *in toto* and cannot be enforced against them or anyone else.[6]

We have held today that the Hatch Act is not impermissibly vague. *CSC* v. *Letter Carriers, ante,* p. 548. We have little doubt that § 818 is similarly not so vague that "men of common intelligence must necessarily guess at its meaning." *Connally* v. *General Construction Co.,* 269 U. S. 385, 391 (1926). See *Grayned* v. *City of Rockford,* 408 U. S. 104, 108–114 (1972); *Colten* v. *Kentucky,* 407 U. S. 104, 110–111 (1972); *Cameron* v. *Johnson,* 390 U. S. 611, 616 (1968). Whatever other problems there are with § 818, it is all but frivolous to suggest that the section fails to give adequate warning of what activities it proscribes or fails to set out "explicit standards" for those who must apply it. *Grayned* v. *City of Rockford, supra,* at 108. In the plainest language, it

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[5] Appellants also claim that § 818 violates the Equal Protection Clause of the Fourteenth Amendment by singling out classified service employees for restrictions on partisan political expression while leaving unclassified personnel free from such restrictions. The contention is somewhat odd in the context of appellants' principal claim, which is that § 818 reaches too far rather than not far enough. In any event, the legislature must have some leeway in determining which of its employment positions require restrictions on partisan political activities and which may be left unregulated. See *McGowan* v. *Maryland,* 366 U. S. 420 (1961). And a State can hardly be faulted for attempting to limit the positions upon which such restrictions are placed.

[6] Only the sixth and seventh paragraphs of § 818 are at issue in this lawsuit. Hereinafter, references to § 818 should be understood to be limited to those paragraphs, unless we indicate to the contrary.

prohibits any state classified employee from being "an officer or member" of a "partisan political club" or a candidate for "any paid public office." It forbids solicitation of contributions "for any political organization, candidacy or other political purpose" and taking part "in the management or affairs of any political party or in any political campaign." Words inevitably contain germs of uncertainty and, as with the Hatch Act, there may be disputes over the meaning of such terms in § 818 as "partisan," or "take part in," or "affairs of" political parties. But what was said in *Letter Carriers, ante,* at 578–579, is applicable here: "there are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." [7] Moreover, even if the outermost boundaries of § 818 may be imprecise, any such uncertainty has little relevance here, where appellants' conduct falls squarely within the "hard core" of the statute's proscriptions and appellants concede as much.[8] See *Dombrowski* v. *Pfister,* 380 U. S. 479, 491–492 (1965); *United States* v. *National Dairy Products Corp.,* 372 U. S. 29 (1963); *Williams* v. *United States,* 341 U. S. 97 (1951); *Robinson* v. *United States,* 324 U. S. 282, 286 (1945); *United States* v. *Wurzbach,* 280 U. S. 396 (1930).

[7] It is significant in this respect to note that § 818 does not create a "regulatory maze" where those uncertain may become hopelessly lost. See *Keyishian* v. *Board of Regents,* 385 U. S. 589, 604 (1967). Rather, the State Personnel Board is available to rule in advance on the permissibility of particular conduct under the explicit standards set out in and under § 818. See Tr. of Rec. 237. See *CSC* v. *Letter Carriers, ante,* at 580.

[8] Tr. of Oral Arg. 48–49.

Shortly before appellants commenced their action in the District Court, they were charged by the State Personnel Board with patent violations of § 818.[9] According to the Board's charges, appellants actively participated in the 1970 re-election campaign of a Corporation Commissioner, appellants' superior. All three allegedly asked other Corporation Commission employees (individually and in groups) to do campaign work or to give referrals to persons who might help in the campaign. Most of these requests were made at district offices of the Commission's Oil and Gas Conservation Division. Two of the appellants were charged with soliciting money for the campaign from Commission employees and one was also charged with receiving and distributing campaign posters in bulk. In the context of this type of obviously covered conduct, the statement of Mr. Justice Holmes is particularly appropriate: "if there is any difficulty . . . it will be time enough to consider it when raised by someone whom it concerns." *United States* v. *Wurzbach, supra,* at 399.

Appellants assert that § 818 has been construed as applying to such allegedly protected political expression as the wearing of political buttons or the displaying

[9] The District Court initially requested the parties to brief the question whether appellants were required to complete the Board's proceedings prior to bringing their action under 42 U. S. C. § 1983. The Board, however, on appellants' application, ordered its proceedings stayed pending adjudication of the federal constitutional questions in the District Court. When advised of the Board's decision, and in the absence of any objections from appellees, the District Court proceeded. On this record, we need not consider whether appellants would have been required to proceed to hearing before the Board prior to pursuing their § 1983 action. Cf. *Gibson* v. *Berryhill,* 411 U. S. 564, 574–575 (1973); H. Hart & H. Wechsler, The Federal Courts and The Federal System 983–985 (2d ed. 1973).

of bumper stickers.[10] But appellants did not engage in any such activity. They are charged with actively engaging in partisan political activities—including the solicitation of money—among their coworkers for the benefit of their superior. Appellants concede—and correctly so, see *Letter Carriers, supra*—that § 818 would be constitutional as applied to this type of conduct.[11] They nevertheless maintain that the statute is overbroad and purports to reach protected, as well as unprotected conduct, and must therefore be struck down on its face and held to be incapable of any constitutional application. We do not believe that the overbreadth doctrine may appropriately be invoked in this manner here.

Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, *e. g., Austin* v. *The Aldermen*, 7 Wall. 694, 698–699 (1869); *Supervisors* v. *Stanley*, 105 U. S. 305, 311–315 (1882); *Hatch* v. *Reardon*, 204 U. S. 152, 160–161 (1907); *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219–220 (1912); *United States* v. *Wurzbach, supra*, at 399; *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 513 (1937); *United States* v. *Raines*, 362 U. S. 17 (1960). A closely related principle is that constitutional rights are personal and may not be asserted vicariously. See *McGowan* v. *Maryland*, 366 U. S. 420, 429–430 (1961). These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts

[10] The State Personnel Board has so interpreted § 818. See Merit System of Personnel Administration Rules § 1641; the Board's official circular, Tr. of Rec. 237.

[11] Tr. of Oral Arg. 48–49.

are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See *Younger* v. *Harris*, 401 U. S. 37, 52 (1971). Constitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court:

> "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803).

In the past, the Court has recognized some limited exceptions to these principles, but only because of the most "weighty countervailing policies." *United States* v. *Raines*, 362 U. S., at 22–23.[12] One such exception is where individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves. See *Eisenstadt* v. *Baird*, 405 U. S. 438, 444–446 (1972); *NAACP* v. *Alabama*, 357 U. S. 449 (1958). Another exception has been carved out in the area of the First Amendment.

It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression

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[12] See generally Hart & Wechsler, *supra*, at 184–214; Sedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L. J. 599 (1962); Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970).

has to give way to other compelling needs of society. *Herndon* v. *Lowry*, 301 U. S. 242, 258 (1937); *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960); *Grayned* v. *City of Rockford*, 408 U. S., at 116–117. As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—"attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski* v. *Pfister*, 380 U. S., at 486. Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Such claims of facial overbreadth have been entertained in cases involving statutes which, by their terms, seek to regulate "only spoken words." *Gooding* v. *Wilson*, 405 U. S. 518, 520 (1972). See *Cohen* v. *California*, 403 U. S. 15 (1971); *Street* v. *New York*, 394 U. S. 576 (1969); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). In such cases, it has been the judgment of this Court that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes. Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations. See *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *United States* v. *Robel*, 389 U. S. 258 (1967); *Aptheker* v. *Secretary of State*, 378 U. S. 500 (1964); *Shelton* v. *Tucker*, *supra*. Facial

overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct, see *Grayned* v. *City of Rockford, supra,* at 114–121; *Cameron* v. *Johnson,* 390 U. S., at 617–619; *Zwickler* v. *Koota,* 389 U. S. 241, 249–250 (1967); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights. See *Shuttlesworth* v. *Birmingham,* 394 U. S. 147 (1969); *Cox* v. *Louisiana,* 379 U. S. 536, 553–558 (1965); *Kunz* v. *New York,* 340 U. S. 290 (1951); *Lovell* v. *Griffin,* 303 U. S. 444 (1938).

The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. Application of the overbreadth doctrine in this manner is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute. See *Dombrowski* v. *Pfister,* 380 U. S., at 491; *Cox* v. *New Hampshire,* 312 U. S. 569 (1941); *United States* v. *Thirty-seven Photographs,* 402 U. S. 363 (1971); cf. *Breard* v. *Alexandria,* 341 U. S. 622 (1951). Equally important, overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct. In *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), Jesse Cantwell, a Jehovah's Witness, was convicted of common-law breach of the peace for playing a phonograph record attacking the

Catholic Church before two Catholic men on a New Haven street. The Court reversed the judgment affirming Cantwell's conviction, but only on the ground that his conduct, "considered in the light of the constitutional guarantees," could not be punished under "the common law offense in question." *Id.*, at 311 (footnote omitted). The Court did not hold that the offense "known as breach of the peace" must fall *in toto* because it was capable of some unconstitutional applications, and, in fact, the Court seemingly envisioned its continued use against "a great variety of conduct destroying or menacing public order and tranquility." *Id.*, at 308. See *Garner* v. *Louisiana*, 368 U. S. 157, 202–203, 205 (1961) (Harlan, J., concurring in judgment). Similarly, in reviewing the statutory breach-of-the-peace convictions involved in *Edwards* v. *South Carolina*, 372 U. S. 229 (1963), and *Cox* v. *Louisiana*, *supra*, at 544–552, the Court considered in detail the State's evidence and in each case concluded that the conduct at issue could not itself be punished under a breach-of-the-peace statute. On that basis, the judgments affirming the convictions were reversed.[13] See also *Teamsters Union* v. *Vogt, Inc.*, 354 U. S. 284 (1957). Additionally, overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, noncensorial manner. See *United States*

[13] In both *Edwards* and *Cox*, at the very end of the discussions, the Court also noted that the statutes would be facially unconstitutional for overbreadth. See 372 U. S. 229, 238; 379 U. S. 536, 551–552. In *Cox*, the Court termed this discussion an "additional reason" for its reversal. 379 U. S., at 551. These "additional" holdings were unnecessary to the dispositions of the cases, so much so that only one Member of this Court relied on *Cox*'s "additional" holding in *Brown* v. *Louisiana*, 383 U. S. 131 (1966), which involved convictions under the very same breach-of-the-peace statute. See *id.*, at 143–150 (BRENNAN, J., concurring in judgment).

v. *Harriss*, 347 U. S. 612 (1954); *United States* v. *CIO*, 335 U. S. 106 (1948); cf. *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367 (1969); *Pickering* v. *Board of Education*, 391 U. S. 563, 565 n. 1 (1968); *Eastern Railroad Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961).

It remains a "matter of no little difficulty" to determine when a law may properly be held void on its face and when "such summary action" is inappropriate. *Coates* v. *City of Cincinnati*, 402 U. S. 611, 617 (1971) (opinion of Black, J.). But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman* v. *United States*, 394 U. S. 165, 174–175 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-

case analysis of the fact situations to which its sanctions, assertedly, may not be applied.[14]

Unlike ordinary breach-of-the-peace statutes or other broad regulatory acts, § 818 is directed, by its terms, at political expression which if engaged in by private persons would plainly be protected by the First and Fourteenth Amendments. But at the same time, § 818 is not a censorial statute, directed at particular groups or viewpoints. Cf. *Keyishian* v. *Board of Regents, supra.* The statute, rather, seeks to regulate political activity in an even-handed and neutral manner. As indicated, such statutes have in the past been subject to a less exacting overbreadth scrutiny. Moreover, the fact remains that § 818 regulates a substantial spectrum of conduct that is as manifestly subject to state regulation as the public peace or criminal trespass. This much was established in *United Public Workers* v. *Mitchell,* and has been unhesitatingly reaffirmed today in *Letter Carriers, supra.* Under the decision in *Letter Carriers,* there is no question that § 818 is valid at least insofar as it forbids classified employees from: soliciting contributions for partisan candidates, political parties, or other partisan political purposes; becoming members of national, state, or local committees of political parties, or officers or committee members in partisan political clubs,

[14] My Brother BRENNAN asserts that in some sense a requirement of substantial overbreadth is already implicit in the doctrine. *Post,* at 630. This is a welcome observation. It perhaps reduces our differences to our differing views of whether the Oklahoma statute is substantially overbroad. The dissent also insists that *Coates* v. *City of Cincinnati,* 402 U. S. 611 (1971), must be taken as overruled. But we are unpersuaded that *Coates* stands as a barrier to a rule that would invalidate statutes for overbreadth only when the flaw is a substantial concern in the context of the statute as a whole. Our judgment is that the Oklahoma statute, when authoritative administrative constructions are accepted, is not invalid under such a rule.

or candidates for any paid public office; taking part in the management or affairs of any political party's partisan political campaign; serving as delegates or alternates to caucuses or conventions of political parties; addressing or taking an active part in partisan political rallies or meetings; soliciting votes or assisting voters at the polls or helping in a partisan effort to get voters to the polls; participating in the distribution of partisan campaign literature; initiating or circulating partisan nominating petitions; or riding in caravans for any political party or partisan political candidate.

These proscriptions are taken directly from the contested paragraphs of § 818, the Rules of the State Personnel Board and its interpretive circular, and the authoritative opinions of the State Attorney General. Without question, the conduct appellants have been charged with falls squarely within these proscriptions.

Appellants assert that § 818 goes much farther than these prohibitions. According to appellants, the statute's prohibitions are not tied tightly enough to *partisan* political conduct and impermissibly relegate employees to expressing their political views "privately." The State Personnel Board, however, has construed § 818's explicit approval of "private" political expression to include virtually any expression not within the context of active partisan political campaigning,[15] and the State's Attorney General, in plain terms, has interpreted § 818 as prohibiting "clearly partisan political activity" only.[16]

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[15] The Board's interpretive circular states (Tr. of Rec. 237):

"The right to express political opinions is reserved to all such persons. Note: This reservation is subject to the prohibition that such persons may not take active part in political management or in political campaigns."

[16] Op. Atty. Gen. Okla., No. 68-356, p. 4 (1968). The District Court similarly interpreted § 818 as intending to permit public expressions of political opinion "so long as the employee does

Surely a court cannot be expected to ignore these authoritative pronouncements in determining the breadth of a statute. *Law Students Research Council* v. *Wadmond*, 401 U. S. 154, 162–163 (1971). Appellants further point to the Board's interpretive rules purporting to restrict such allegedly protected activities as the wearing of political buttons or the use of bumper stickers. It may be that such restrictions are impermissible and that § 818 may be susceptible of some other improper applications. But, as presently construed, we do not believe that § 818 must be discarded *in toto* because some persons' arguably protected conduct may or may not be caught or chilled by the statute. Section 818 is not substantially overbroad and is not, therefore, unconstitutional on its face.

The judgment of the District Court is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

This case in my view should be governed by some of the considerations I set forth in my dissent in the *Letter Carriers* case, *ante*, p. 595.

Section 818, par. 7, of the Oklahoma Act states:

> "No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee *of a partisan political club*, or a candidate for nomination or election to any paid public office, or *shall take part in the management or affairs* of any political party *or in any political campaign*, except to exercise his right as a citizen privately

not channel his activity towards party success." 338 F. Supp. 711, 716. Although the Court's interpretation is obviously not binding on state authorities, see *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971), a federal court must determine what a state statute means before it can judge its facial constitutionality.

to express his opinion and to cast his vote." (Emphasis supplied.)

If this were a regulation of business or commercial matters the Court's citation of *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, would be apt. *Connally* was a case involving a state law making it a crime for contractors with the State to pay their workmen less than the "current rate of per diem wages in the locality where the work is performed." The Court held the Act too vague to pass muster as a penal measure. I would concede that by the *Connally* test § 818, par. 7, would not fall. For the provision in question bars an employee from taking "part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

But the problem here concerns not commerce but the First Amendment. The First Amendment goes further than protecting a person for "privately" expressing his opinion. Public as well as private discourse is included; and the emphasis in § 818, par. 7, that *private* expression of views is tolerated emphasizes that public expression is not tolerated.

I do not see how government can deprive its employees of the right to speak, write, assemble, or petition once the office is closed and the employee is home on his own. Public discussion of local, state, national, and international affairs is grist for the First Amendment mill. Our decisions emphasize that free debate, uninhibited discussion, robust and wide-open controversy, a multitude of tongues, the pressure of ideas clear across the spectrum set the pattern of First Amendment freedoms. We emphasized in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 272, that neither injury "to official reputation" nor "factual error" justified repression of

speech, that the demands of free speech lowered the barriers to libel actions for charges of official misconduct or improprieties.

First Amendment rights are indeed fundamental, for "we the people" are the sovereigns, not those who sit in the seats of the mighty. It is the voice of the people who ultimately have the say; once we fence off a group, and bar them from public dialogue, the public interest is the loser. Those who are tied into the federal regime either by direct employment or by state projects federally financed now amount to about five and a half million. The number included, if all state employees are added, is estimated* at over 13 million.

These people are scrubwomen, janitors, typists, file clerks, chauffeurs, messengers, nurses, orderlies, policemen and policewomen, night watchmen, telephone and elevator operators, as well as those doing some kind of administrative, executive, or judicial work. There are activities that do not touch on First Amendment rights which can be banned. There are illegal election procedures such as wiretapping, burglary, and mailing politically salacious letters that are beyond the pale. The First Amendment, however, concerns a variety of activities that are deep in our tradition: forming *ad hoc* committees to lobby measures through a council or other legislative body; organizing protective associations to protect lakes, rivers, islands of wilderness, or a neighborhood; preparing and circulating petitions for signatures in support of legislative reforms; making protest marches or picketing the statehouse for a public cause—these as well as debate, passing out campaign literature, watching at the polls, making radio and TV appearances, addressing rallies in parks or auditoriums, are all part of the intense process of mobilizing "we the people" for or against

*Statistical Abstract of the United States 1972, pp. 403, 431.

specific measures, shaping public opinion, getting X rather than Y elected, and so on.

A bureaucracy that is alert, vigilant, and alive is more efficient than one that is quiet and submissive. It is the First Amendment that makes it alert, vigilant, and alive. It is suppression of First Amendment rights that creates faceless, nameless bureaucrats who are inert in their localities and submissive to some master's voice. High values ride on today's decision in this case and in *Letter Carriers*. I would not allow the bureaucracy in the State or Federal Government to be deprived of First Amendment rights. Their exercise certainly is as important in the public sector as it is in the private sector. Those who work for government have no watered-down constitutional rights. So far as the First Amendment goes, I would keep them on the same plane as all other people.

I would reverse the judgment below.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

Whatever one's view of the desirability or constitutionality of legislative efforts to restrict the political activities of government employees, one must regard today's decision upholding § 818 of the Oklahoma Merit System of Personnel Administration Act [1] as a wholly

[1] Okla. Stat. Ann., Tit. 74, § 818, provides in pertinent part:

"No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service.

"No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer

unjustified retreat from fundamental and previously well-established First and Fourteenth Amendment principles. For the purposes of this decision, the Court assumes—perhaps even concedes—that the statute at issue here sweeps too broadly, barring speech and conduct that are constitutionally protected even under the standards announced in *United Public Workers* v. *Mitchell*, 330 U. S. 75 (1947), and reiterated today in *CSC* v. *Letter Carriers*, *ante*, p. 548. Nevertheless, the Court rejects appellants' contention that the statute is unconstitutional on its face, reasoning that "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. It is our view that § 818 is not substantially overbroad and that whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Ante*, at 615–616. That conclusion finds no support in previous decisions of this Court, and it effectively overrules our decision just two Terms ago in *Coates* v. *City of Cincinnati*, 402 U. S. 611 (1971). I remain convinced that *Coates* was correctly decided, and I must therefore respectfully dissent.

As employees of the Corporation Commission of the State of Oklahoma, a state agency, appellants are subject to the provisions of the State's Merit Act. That Act designates certain state agencies, including the Corporation Commission, which are barred from dismissing or suspending classified employees for political reasons.

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or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

At the same time, the Act authorizes the State Personnel Board to dismiss or suspend any classified employee who engages in certain prohibited political activity. Although specifically protecting an employee's right "as a citizen privately to express his opinion and to cast his vote," the Act bars (1) fund raising for any political purpose; (2) membership in any national, state, or local committee of a political party or a political club; (3) candidacy for any public office; and (4) participation "in the management or affairs of any political party or in any political campaign."

As a result of appellants' alleged participation in the 1970 re-election campaign of Corporation Commissioner Ray C. Jones, the State Personnel Board formally charged appellants with violations of the Act. Appellants then brought this action under 42 U. S. C. § 1983 before a three-judge Federal District Court in the Western District of Oklahoma, seeking an injunction against enforcement of the Act. The District Court rejected appellants' contentions that the Act is unconstitutionally vague and overbroad, and the Court today affirms that determination.

Appellants' claims are, of course, similar to the vagueness and overbreadth contentions rejected by the Court today in upholding § 9 (a) of the Hatch Act, 5 U. S. C. § 7324 (a)(2). See *Letter Carriers, supra.* But that decision, whether or not correct, is by no means controlling on the questions now before us. Certain fundamental differences between the Hatch Act and the Oklahoma Merit Act should, at the outset, be made clear.

Section 9 (a) of the Hatch Act provides that a Federal Government employee may not "(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election; or (2) take an active part in political management or in political cam-

paigns." Although recognizing that the meaning of the Act's critical phrase, "an active part in political management or in political campaigns," is hardly free from ambiguity, the Court concluded that the terms could be defined by reference to a complex network of Civil Service Commission regulations developed over many years and comprehensively restated in 1970. See 5 CFR § 733. Those regulations make clear that among the rights retained by a federal employee, notwithstanding the arguably contrary language of the statute, are the rights to "[e]xpress his opinion as an individual privately and publicly on political subjects and candidates"; to "[d]isplay a political picture, sticker, badge, or button"; to "[b]e a member of a political party or other political organization . . ."; and to "[m]ake a financial contribution to a political party or organization." 5 CFR § 733.111.

By contrast, the critical phrase of the Oklahoma Act—no employee shall "take part in the management or affairs of any political party or in any political campaign"—is left almost wholly undefined. While the Act does specifically declare that employees have the right to express their views "privately," it nowhere defines the terms "take part" or "management" or "affairs." The reservation of the right to express one's views in private could, moreover, be thought to mean that any public expression of views is forbidden. Of course, the Oklahoma Act can, like its federal counterpart, be viewed in conjunction with the applicable administrative regulations. But in marked contrast with the elaborate set of regulations purporting to define the prohibitions of the Hatch Act, the pertinent regulations of the State Personnel Board are a scant five rules that shed no light at all on the intended reach of the statute. Two

of those rules merely recite the language of the Act.[2] A third offers no more specific guidance than the general exhortation that a classified employee shall "pursue the common good, and, not only be impartial, but so act as neither to endanger his impartiality nor to give occasion for distrust of his impartiality."[3] A fourth provides

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[2] Oklahoma Merit System of Personnel Administration Rule 1630 (1971) provides:

"No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or contribution from an employee in the classified service."

Rule 1640 provides:

"No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote."

Compare n. 1, *supra*.

[3] Rule 1625 provides:

"Every classified employee shall fulfill to the best of his ability the duties of the office of [*sic*] position conferred upon him and shall prove himself in his behavior, inside and outside, the worth of the esteem which his office or position requires. In his official activities the classified employee shall pursue the common good, and, not only be impartial, but so act as neither to endanger his impartiality nor to give occasion for distrust of his impartiality.

"A classified employee shall not engage in any employment, activity or enterprise which has been determined to be inconsistent, incompatible, or in conflict with his duties as a classified employee or with the duties, functions or responsibilities of the Appointing Authority by which he is employed.

"Each Appointing Authority shall determine and prescribe those

that a classified employee must resign his position "prior to filing as a candidate for public office, seeking or accepting nomination for election or appointment as an official of a political party"—again, merely tracking the language of the Act.[4] The fifth, Rule 1641, far from clarifying or limiting the scope of the Act, provides the major thrust to appellants' overbreadth contention. The rule declares that "[a]n employee in the classified service may not wear a political badge, button, or similar partisan emblem, nor may such employee display a partisan political sticker or sign on an automobile operated by

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activities which, for employees under its jurisdiction, will be considered inconsistent, incompatible or in conflict with their duties as classified employees. In making this determination the Appointing Authority shall give consideration to employment, activity or enterprise which: (a) involves the use for private gain or advantage of state time, facilities, equipment and supplies; or, the badge, uniform, prestige or influence of one's state office of employment, or (b) involves receipt or acceptance by the classified employee of any money or other consideration from anyone, other than the State, for the performance of an act which the classified employee would be required or expected to render in the regular course or hours of his state employment or as a part of his duties as a state classified employee, or (c) involves the performance of an act in other than his capacity as a state classified employee which act may later be subject directly or indirectly to the control, inspection, review, audit or enforcement by such classified employee or the agency by which he is employed.

"Each classified employee shall during his hours of duty and subject to such other laws, rules and regulations as pertain thereto, devote his full time, attention and efforts to his office or employment."

[4] Rule 1209.2 provides:

"Any classified employee shall resign his position prior to filing as a candidate for public office, seeking or accepting nomination for election or appointment as an official of a political party, partisan political club or organization or serving as a member of a committee of any such group or organization."

him or under his control." [5] Even the Court concedes that a ban on the wearing of buttons or the display of bumper stickers may be "impermissible." *Ante*, at 618.

It is possible, of course, that the inherent ambiguity of the Oklahoma statute might be cured by judicial construction of its terms. But the Oklahoma Supreme Court has never attempted to construe the Act or narrow its apparent reach. Plainly, this Court cannot undertake that task. *Gooding* v. *Wilson*, 405 U. S. 518, 520 (1972); *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971).[6] I must assume, therefore, that the Act, subject to whatever gloss is provided by the administrative regulations,[7] is capable of applications that would prohibit speech and conduct clearly protected by the First Amendment. Even on the assumption that the

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[5] Rule 1641 also provides:

"Continued use or display of such political material shall be deemed willful intent to violate the provisions of 74 O. S. 1961 § 818 relating to prohibited political activities of classified State employees and shall subject such employee to dismissal pursuant to said statute."

[6] See also *Niemotko* v. *Maryland*, 340 U. S. 268, 285 (1951) (Frankfurter, J., concurring in the result in related case of *Kunz* v. *New York*, 340 U. S. 290 (1951)): "It is not for this Court to formulate with particularity the terms of a permit system which would satisfy the Fourteenth Amendment."

[7] In addition to the regulations promulgated by the State Personnel Board, the Court places some reliance on an interpretive circular issued by the Board and on certain opinions issued by the State Attorney General. Even assuming that these constructions should properly be considered in gauging the reach of the Act, they offer little real guidance to the meaning of the terms. The circular, for example, states that "The right to express political opinions is reserved to all such persons. Note: This reservation is subject to the prohibition that such persons may not take active part in political management or in political campaigns." See *ante*, at 617 n. 15. The second half of that statement merely restates the provision of

statute's regulatory aim is permissible, the manner in which state power is exercised is one that unduly infringes protected freedoms. *Shelton* v. *Tucker,* 364 U. S. 479, 489 (1960); *Cantwell* v. *Connecticut,* 310 U. S. 296, 304 (1940). The State has failed, in other words, to provide the necessary "sensitive tools" to carry out the "separation of legitimate from illegitimate speech." *Speiser* v. *Randall,* 357 U. S. 513, 525 (1958). See *NAACP* v. *Button,* 371 U. S. 415, 433 (1963).

Although the Court does not expressly hold that the statute is vague and overbroad, it does assume not only that the ban on the wearing of badges and buttons may be "impermissible," but also that the Act "may be susceptible of some other improper applications." *Ante,* at 618. Under principles that I had thought were established beyond dispute, that assumption requires a finding that the statute is unconstitutional on its face. Ordinarily, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines,* 362 U. S. 17, 21 (1960).[8] And appellants apparently concede that

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the Act. The first half can hardly be said to convey any fixed meaning. In fact, given the statement in the Act that the right to make a private expression of political views is protected, an employee might reasonably interpret the circular to mean that "The right to express political opinions is reserved to all such persons, provided that such expression is not made in public." Similarly, the Court makes reference to an Opinion of the Attorney General holding, "in plain terms," *ante,* at 617, that the Act applies only to "clearly partisan political activity." I am at a loss to see how these statements offer any clarification of the provisions of the Act.

[8] *Raines* concerned a prosecution under § 131 of the Civil Rights Act of 1957, charging that the defendants, in their capacity as

the State could prohibit the conduct with which they were charged without infringing the guarantees of the First Amendment. Nevertheless, we have repeatedly recognized that "the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Gooding* v. *Wilson, supra,* at 521, quoting from *Dombrowski* v. *Pfister,* 380 U. S. 479, 486 (1965).[9] We have adhered to that view because the guarantees of the First Amendment are "delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. *Smith* v. *California,* [361 U. S. 147, 151–154 (1959)]." *NAACP* v. *Button, supra,* at 433. The mere existence of a statute that sweeps too broadly in areas protected by the First Amendment "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. . . .

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state officials, had discriminated against blacks who desired to register to vote. The defendants' conduct plainly fell within the permissible reach of the statute. But more importantly, it was not even suggested that the statute might conceivably be used to punish the exercise of First Amendment rights. While stating the general rule that a defendant normally may not assert the constitutional rights of a person not a party, *Raines* did specifically recognize that the rule is suspended in cases where its application would "itself have an inhibitory effect on freedom of speech." 362 U. S. 17, 22. Cf. *United States* v. *National Dairy Corp.,* 372 U. S. 29 (1963); *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.,* 226 U. S. 217 (1912).

[9] See also *Kunz* v. *New York,* 340 U. S. 290 (1951); *Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964); *Terminiello* v. *Chicago,* 337 U. S. 1 (1949).

Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression." *Thornhill* v. *Alabama*, 310 U. S. 88, 98 (1940). See Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 853–854 (1970).

Although the Court declines to hold the Oklahoma Act unconstitutional on its face, it does expressly recognize that overbreadth review is a necessary means of preventing a "chilling effect" on protected expression. Nevertheless, the Court reasons that the function of the doctrine "attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Ante*, at 615. Where conduct is involved, a statute's overbreadth must henceforth be "substantial" before the statute can properly be found invalid on its face.

I cannot accept the validity of that analysis. In the first place, the Court makes no effort to define what it means by "substantial overbreadth." We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine. Cf. Note, The First Amendment Overbreadth Doctrine, *supra*, at 858–860, 918. Whether the Court means to require some different or greater showing of substantiality is left obscure by today's opinion, in large part because the Court makes no effort to explain why

the overbreadth of the Oklahoma Act, while real, is somehow not quite substantial. No more guidance is provided than the Court's conclusory assertion that appellants' showing here falls below the line.

More fundamentally, the Court offers no rationale to explain its conclusion that, for purposes of overbreadth analysis, deterrence of conduct should be viewed differently from deterrence of speech, even where both are equally protected by the First Amendment. Indeed, in the case before us it is hard to know whether the protected activity falling within the Act should be considered speech or conduct. In any case, the conclusion that a distinction should be drawn was the premise of MR. JUSTICE WHITE'S dissenting opinion in *Coates* v. *City of Cincinnati*, 402 U. S. 611, 620–621 (1971), and that conclusion—although squarely rejected in *Coates*—has now been adopted by the Court.

At issue in *Coates* was a city ordinance making it an offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." *Id.*, at 611. There can be no doubt that the ordinance was held unconstitutional on its face, and not merely unconstitutional as applied to particular, protected conduct. For the Court expressly noted that the ordinance was "aimed directly at activity protected by the Constitution. We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech." *Id.*, at 616. In dissent, MR. JUSTICE WHITE maintained that since the ordinance

prohibited persons from "assembling and 'conduct[ing]' themselves in a manner annoying to other persons," he would "deal with the Cincinnati ordinance as we would with the ordinary criminal statute. The ordinance clearly reaches certain conduct but may be illegally vague with respect to other conduct. The statute is not infirm on its face and since we have no information from this record as to what conduct was charged against these defendants, we are in no position to judge the statute as applied. That the ordinance may confer wide discretion in a wide range of circumstances is irrelevant when we may be dealing with conduct at its core." *Id.*, at 620–621. Thus, *Coates* stood, until today, for the proposition that where a statute is "unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct," *id.*, at 614, it must be held invalid on its face whether or not the person raising the challenge could have been prosecuted under a properly narrowed statute.[10] The Court makes no attempt to distinguish *Coates*, implicitly conceding that the decision has been overruled.

At this stage, it is obviously difficult to estimate the probable impact of today's decision. If the requirement of "substantial" overbreadth is construed to mean only that facial review is inappropriate where the likelihood of an impermissible application of the statute is too small to generate a "chilling effect" on protected speech or conduct, then the impact is likely to be small. On the

[10] The Court has applied overbreadth review to many other statutes that assertedly had a "chilling effect" on protected conduct, rather than on "pure speech." See, *e. g.*, *United States* v. *Robel*, 389 U. S. 258 (1967); *Aptheker* v. *Secretary of State*, *supra*; *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). In none of these cases, or others involving conduct rather than speech, did the Court suggest that a defendant would lack standing to raise the overbreadth claim if his conduct could be proscribed by a narrowly drawn statute.

other hand, if today's decision necessitates the drawing of artificial distinctions between protected speech and protected conduct, and if the "chill" on protected conduct is rarely, if ever, found sufficient to require the facial invalidation of an overbroad statute, then the effect could be very grave indeed. In my view, the principles set forth in *Coates* v. *City of Cincinnati*, are essential to the preservation and enforcement of the First Amendment guarantees. Since no subsequent development has persuaded me that the principles are ill-founded or that *Coates* was incorrectly decided, I would reverse the judgment of the District Court on the strength of that decision and hold § 818 of the Oklahoma Merit Act unconstitutional on its face.

SUGARMAN, ADMINISTRATOR, NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, ET AL. *v.* DOUGALL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 71-1222. Argued January 8, 1973—Decided June 25, 1973

Section 53 of the New York Civil Service Law provides that only United States citizens may hold permanent positions in the competitive class of the state civil service. The District Court concluded that the statute was violative of the Fourteenth Amendment and the Supremacy Clause, and granted injunctive relief. *Held:*

1. Section 53 violates the Equal Protection Clause of the Fourteenth Amendment since, in the context of New York's statutory civil service scheme, it sweeps indiscriminately and is not narrowly limited to the accomplishment of substantial state interests. Pp. 638–643.

2. The "special public interest" doctrine has no applicability in this case. Pp. 643–645.

3. Nor can the citizenship requirement be justified on the unproved premise that aliens are less permanent employees than citizens, or on other grounds asserted by appellants. Pp. 645–646.

4. While the State has an interest in defining its political community, and a corresponding interest in establishing the qualifications for persons holding state elective or important nonelective executive, legislative, and judicial positions, the broad citizenship requirement established by § 53 cannot be justified on this basis. Pp. 646–649.

339 F. Supp. 906, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 649.

Samuel A. Hirshowitz, First Assistant Attorney General of New York, argued the cause for appellants. With him on the briefs were *Louis J. Lefkowitz*, Attorney

General, and *Judith A. Gordon,* Assistant Attorney General.

Lester Evens argued the cause and filed a brief for appellees.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Section 53 (1) of the New York Civil Service Law reads:

> "Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States." [1]

**J. Shane Creamer,* Attorney General, and *James R. Adams,* Deputy Attorney General, filed a brief for the Commonwealth of Pennsylvania as *amicus curiae* urging affirmance.

[1] The restriction has its statutory source in Laws of New York, 1939, c. 767, § 1. We are advised that the legislation was declarative of an administrative practice that had existed for many years. Tr. of Oral Arg. 43, 45.

Section 53 (2) of N. Y. Civ. Serv. Law (Supp. 1972–1973) makes a temporary exception to the citizenship requirement:

"2. Notwithstanding any of the provisions of this chapter or of any other law, whenever a department head or appointing authority deems that an acute shortage of employees exists in any particular class or classes of positions by reason of a lack of a sufficient number of qualified personnel available for recruitment, he may present evidence thereof to the state or municipal civil service commission having jurisdiction which, after due inquiry, may determine the existence of such shortage and waive the citizenship requirement for appointment to such class or classes of positions. The state commission or such municipal commission, as the case may be, shall annually review each such waiver of the citizenship requirement, and shall revoke any such waiver whenever it finds that a shortage no longer exists. A non-citizen appointed pursuant to the provisions of this section shall not be eligible for continued employment unless he diligently prosecutes the procedures for citizenship."

It is to be observed that an appointment under this exception permits the alien to continue his employment only until, on annual

The four appellees, Patrick McL. Dougall, Esperanza Jorge, Teresa Vargas, and Sylvia Castro, are federally registered resident aliens. When, because of their alienage, they were discharged in 1971 from their competitive civil service positions with the city of New York, the appellees instituted this class action challenging the constitutionality of § 53. The named defendants, and appellants here, were the Administrator of the city's Human Resources Administration (HRA), and the city's Director of Personnel and Chairman of its Civil Service Commission. The appellees sought (1) a declaration that the statute was invalid under the First and Fourteenth Amendments, (2) injunctive relief against any refusal, on the ground of alienage, to appoint and employ the appellees, and all persons similarly situated, in civil service positions in the competitive class, and (3) damages for lost earnings. A defense motion to dismiss for want of jurisdiction was denied by Judge Tenney, 330 F. Supp. 265 (SDNY 1971). A three-judge court was convened. That court ruled that the statute was violative of the Fourteenth Amendment and the Supremacy Clause, and granted injunctive relief. 339 F. Supp. 906 (SDNY 1971).[2] Judge Lumbard joined the court's opinion and judgment, but wrote separately in concurrence. *Id.*, at 911. Probable jurisdiction was noted. 407 U. S. 908 (1972).

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review, it is deemed that "a shortage no longer exists." And, in any event, the alien "shall not be eligible for continued employment unless he diligently prosecutes the procedures for citizenship."

[2] The court found jurisdiction in the Civil Rights Statutes, 28 U. S. C. §§ 1343 (3) and (4). 339 F. Supp. 906, 907 n. 5. It held that the suit was properly maintainable as a class action and defined the class as consisting of "all permanent resident aliens residing in New York State who, but for the enforcement of Section 53, would otherwise be eligible to compete for employment in the competitive class of Civil Service." *Id.*, at 907 n. 4.

I

Prior to December 28, 1970, the appellees were employed by nonprofit organizations that received funds through HRA from the United States Office of Economic Opportunity. These supportive funds ceased to be available about that time and the organizations, with approximately 450 employees, including the appellees and 16 other noncitizens, were absorbed by the Manpower Career and Development Agency (MCDA) of HRA.[3] The appellant Administrator advised the transferees that they would be employed by the city.[4] The appellees in fact were so employed in MCDA. In February, however, they were informed that they were ineligible for employment by the city and that they would be dismissed under the statutory mandate of § 53 (1). Shortly thereafter, they were discharged from MCDA solely because of their alienage.[5]

Appellee Dougall was born in Georgetown, Guyana, in September 1927. He has been a resident of New York City since 1964. He was employed by MCDA as an administrative assistant in the staff Development Unit.

Appellee Jorge was born in November 1948 in the Dominican Republic. She has been a resident of New

[3] Affidavit of Harold O. Basden, Director of Personnel of the Human Resources Administration, App. 31–33.

[4] Section 45 of the New York Civil Service Law, applicable to employees of a private institution acquired by the State or a public agency, contains a restriction, similar to that in § 53 (1), against the employment of an alien in a position classified in the competitive class.

[5] The appellants in their answer alleged that appellee Castro was terminated for the additional reason that she lacked sufficient experience to qualify for the position of senior human resources technician. App. 49. The three-judge court in its order, App. 93, excluded appellee Castro from the recognized class. That exclusion is not contested here.

York City since 1967. She was employed by the Puerto Rican Forum as a clerk-typist and, later, as a human resources technician. She worked in the latter capacity for MCDA.

Appellee Vargas was born in the Dominican Republic in June 1946. She has been a resident of New York City since 1963. She worked as a clerk-typist for the Puerto Rican Forum and in the same capacity for MCDA.

Appellee Castro was born in El Salvador in June 1944. She has resided in New York City since 1967. She was employed by the Puerto Rican Forum as an assistant counselor and then as a human resources technician and worked in the latter capacity for MCDA.

The record does not disclose that any of the four appellees ever took any step to attain United States citizenship.

The District Court, in reaching its conclusion that § 53 was unconstitutional under the Fourteenth Amendment, placed primary reliance on this Court's decisions in *Graham* v. *Richardson*, 403 U. S. 365 (1971), and *Takahashi* v. *Fish Comm'n*, 334 U. S. 410 (1948), and, to an extent, on *Purdy & Fitzpatrick* v. *State*, 71 Cal. 2d 566, 456 P. 2d 645 (1969). On the basis of these cases, the court also concluded that § 53 was in conflict with Congress' comprehensive regulation of immigration and naturalization because, in effect, it denied appellees entrance to, and abode in, New York. Accordingly, the court held, § 53 encroached upon an exclusive federal power and was constitutionally impermissible under Art. VI, cl. 2, of the Constitution.

II

As is so often the case, it is important at the outset to define the precise and narrow issue that is here presented. The Court is faced only with the question

whether New York's flat statutory prohibition against the employment of aliens in the competitive classified civil service is constitutionally valid. The Court is not asked to decide whether a particular alien, any more than a particular citizen, may be refused employment or discharged on an individual basis for whatever legitimate reason the State might possess..

Neither is the Court reviewing a legislative scheme that bars some or all aliens from closely defined and limited classes of public employment on a uniform and consistent basis. The New York scheme, instead, is indiscriminate. The general standard is enunciated in the State's Constitution, Art. V, § 6, and is to the effect that appointments and promotions in the civil service "shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." In line with this rather flexible constitutional measure, the classified service is divided by statute into four classes. New York Civil Service Law § 40. The first is the exempt class. It includes, generally, the higher offices in the state executive departments, certain municipal officers, certain judicial employees, and positions for which a competitive or noncompetitive examination may be found to be impracticable. The exempt class contains no citizenship restriction whatsoever. § 41. The second is the noncompetitive class. This includes positions, not otherwise classified, for which a noncompetitive examination would be practicable. There is no citizenship requirement. § 42. The third is the labor class. This includes unskilled laborers holding positions for which competitive examinations would be impracticable. No alienage exclusion is imposed. § 43. The fourth is the competitive class with which we are here concerned. This includes all positions for which it is practicable to determine merit and fitness by a competitive examination.

§ 44. Only citizens of the United States may hold positions in this class. § 53. The limits of these several classes, particularly the competitive class from which the appellees were deemed to be disqualified, are not readily defined. It would appear, however, that, consistent with the broad scope of the cited constitutional provision, the competitive class reaches various positions in nearly the full range of work tasks, that is, all the way from the menial to the policy making.

Apart from the classified civil service, New York has an unclassified service. § 35. This includes, among others, all elective offices, offices filled by legislative appointment, employees of the legislature, various offices filled by the Governor, and teachers. No citizenship requirement is present there.

Other constitutional and statutory citizenship requirements round out the New York scheme. The constitution of the State provides that voters, Art. II, §1, members of the legislature, Art. III, § 7, the Governor and Lieutenant-Governor, Art. IV, § 2, and the Comptroller and Attorney-General, Art. V, § 1, are to be United States citizens. And Public Officers Law § 3 requires that any person holding "a civil office" be a citizen of the United States. A "civil office" is apparently one that "possesses any of the attributes of a public officer or . . . involve[s] some portion of the soverign [*sic*] power." 1967 Op. N. Y. Atty. Gen. 60; *New York Post Corp.* v. *Moses*, 12 App. Div. 2d 243, 250, 210 N. Y. S. 2d 88, 95, rev'd on other grounds, 10 N. Y. 2d 199, 176 N. E. 2d 709 (1961).

We thus have constitutional provisions and a number of statutes that, together, constitute New York's scheme for the exclusion of aliens from public employment. The present case concerns only § 53 of the Civil Service Law. The section's constitutionality, however, is to be judged in the context of the State's broad statutory framework and the justifications the State presents.

III

It is established, of course, that an alien is entitled to the shelter of the Equal Protection Clause. *Graham* v. *Richardson,* 403 U. S. 365, 371 (1971); *Truax* v. *Raich,* 239 U. S. 33, 39 (1915); *Wong Wing* v. *United States,* 163 U. S. 228, 238 (1896); *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369 (1886). See *In re Griffiths, post,* p. 717. This protection extends, specifically, in the words of Mr. Justice Hughes, to aliens who "work for a living in the common occupations of the community." *Truax* v. *Raich,* 239 U. S., at 41.

A. Appellants argue, however, that § 53 does not violate the equal protection guarantee of the Fourteenth Amendment because the statute "establishes a generic classification reflecting the special requirements of public employment in the career civil service." [6] The distinction drawn between the citizen and the alien, it is said, "rests on the fundamental concept of identity between a government and the members, or citizens, of the state." [7] The civil servant "participates directly in the formulation and execution of government policy," and thus must be free of competing obligations to another power.[8] The State's interest in having an employee of undivided loyalty is substantial, for obligations attendant upon foreign citizenship "might impair the exercise of his judgment or jeopardize public confidence in his objectivity." [9] Emphasis is placed on our decision in *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947), upholding the Hatch Act and its proscription of political activity by certain public employees, and it is said that the public employer "has broad discretion to establish quali-

[6] Brief for Appellants 17.
[7] *Id.,* at 22.
[8] *Id.,* at 23.
[9] *Ibid.*

fications for its employees related to the integrity and efficiency of the operations of government." [10]

It is at once apparent, however, that appellants' asserted justification proves both too much and too little. As the above outline of the New York scheme reveals, the State's broad prohibition of the employment of aliens applies to many positions with respect to which the State's proffered justification has little, if any, relationship. At the same time, the prohibition has no application at all to positions that would seem naturally to fall within the State's asserted purpose. Our standard of review of statutes that treat aliens differently from citizens requires a greater degree of precision.

In *Graham* v. *Richardson,* 403 U. S., at 372, we observed that aliens as a class "are a prime example of a 'discrete and insular' minority (see *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152–153, n. 4 (1938))," and that classifications based on alienage are "subject to close judicial scrutiny." And as long as a quarter century ago we held that the State's power "to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Takahashi* v. *Fish Comm'n,* 334 U. S., at 420. We therefore look to the substantiality of the State's interest in enforcing the statute in question, and to the narrowness of the limits within which the discrimination is confined.

Applying this standard to New York's purpose in confining civil servants in the competitive class to those persons who have no ties of citizenship elsewhere, § 53 does not withstand the necessary close scrutiny. We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within "the basic conception of a political community." *Dunn* v. *Blumstein,* 405

[10] *Id.,* at 13.

U. S. 330, 344 (1972). We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose.

Section 53 is neither narrowly confined nor precise in its application. Its imposed ineligibility may apply to the "sanitation man, class B," *Perotta* v. *Gregory,* 4 Misc. 2d 769, 158 N. Y. S. 2d 221 (1957), to the typist, and to the office worker, as well as to the person who directly participates in the formulation and execution of important state policy. The citizenship restriction sweeps indiscriminately. Viewing the entire constitutional and statutory framework in the light of the State's asserted interest, the great breadth of the requirement is even more evident. Sections 35 and 41 of the Civil Service Law, relating generally to persons holding elective and high appointive offices, contain no citizenship restrictions. Indeed, even § 53 permits an alien to hold a classified civil service position under certain circumstances. In view of the breadth and imprecision of § 53 in the context of the State's interest, we conclude that the statute does not withstand close judicial scrutiny.

B. Appellants further contend, however, that the State's legitimate interest is greater than simply limiting to citizens those high public offices that have to do with the formulation and execution of state policy. Understandably relying on this Court's decisions in *Crane* v. *New York,* 239 U. S. 195 (1915), *Heim* v. *McCall,* 239 U. S. 175 (1915), and *Clarke* v. *Deckebach,* 274 U. S. 392 (1927), appellants argue that a State constitutionally may confine public employment to citizens. Mr. Justice (then Judge) Cardozo accepted this "special public interest" argument because of the State's concern with "the restriction of the resources of the state

to the advancement and profit of the members of the state." *People* v. *Crane*, 214 N. Y. 154, 161, 108 N. E. 427, 429, aff'd, 239 U. S. 195 (1915). We rejected that approach, however, in the context of public assistance in *Graham*, where it was observed that "the special public interest doctrine was heavily grounded on the notion that '[w]hatever is a privilege, rather than a right, may be made dependent upon citizenship.' *People* v. *Crane* . . . . But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" 403 U. S., at 374. See also *Sherbert* v. *Verner*, 374 U. S. 398, 404 (1963); *Shapiro* v. *Thompson*, 394 U. S. 618, 627 n. 6 (1969); *Goldberg* v. *Kelly*, 397 U. S. 254, 262 (1970); *Bell* v. *Burson*, 402 U. S. 535, 539 (1971).

Appellants argue that our rejection of the special-public-interest doctrine in a public assistance case does not require its rejection here. That the doctrine has particular applicability with regard to public employment is demonstrated, according to appellants, by the decisions in *Crane* and *Heim* that upheld, under Fourteenth Amendment challenge, those provisions of the New York Labor Law that confined employment on public works to citizens of the United States.[11] See M. Konvitz, The Alien and the Asiatic in American Law, c. 6 (1946).

[11] In the past, the Court has invoked the special-public-interest doctrine to uphold statutes that, in the absence of overriding treaties, limit the right of noncitizens to exploit a State's natural resources, *McCready* v. *Virginia*, 94 U. S. 391 (1877), *Patsone* v. *Pennsylvania*, 232 U. S. 138 (1914); to inherit real property, *Hauenstein* v. *Lynham*, 100 U. S. 483 (1880), *Blythe* v. *Hinckley*, 180 U. S. 333 (1901); and to acquire and own land, *Terrace* v. *Thompson*, 263 U. S. 197 (1923), *Porterfield* v. *Webb*, 263 U. S. 225 (1923), *Webb* v. *O'Brien*, 263 U. S. 313 (1923), *Frick* v. *Webb*, 263 U. S. 326 (1923); but see *Oyama* v. *California*, 332 U. S. 633 (1948).

We perceive no basis for holding the special-public-interest doctrine inapplicable in *Graham* and yet applicable and controlling here. A resident alien may reside lawfully in New York for a long period of time. He must pay taxes. And he is subject to service in this country's Armed Forces. 50 U. S. C. App. § 454 (a). See *Astrup* v. *Immigration Service,* 402 U. S. 509 (1971). The doctrine, rooted as it is in the concepts of privilege and of the desirability of confining the use of public resources, has no applicability in this case. To the extent that *Crane, Heim,* and *Clarke* intimate otherwise, they were weakened by the decisions in *Takahashi* and *Graham,* and are not to be considered as controlling here.

C. The State would tender other justifications for § 53's bar to employment of aliens in the competitive civil service. It is said that career civil service is intended for the long-term employee, and that the alien, who is subject to deportation and, as well, to conscription by his own country, is likely to remain only temporarily in a civil service position. We fully agree with the District Court's response to this contention:

> "There is no offer of proof on this issue and [appellants] would be hard pressed to demonstrate that a permanent resident alien who has resided in New York or the surrounding area for a number of years, as have [appellees], and whose family also resides here, would be a poorer risk for a career position in *New York* . . . than an American citizen who, prior to his employment with the City or State, had been residing in another state." 339 F. Supp., at 909.

Appellants further assert that employment of aliens in the career civil service would be inefficient, for when aliens eventually leave their positions, the State will

have the expense of hiring and training replacements. Even if we could accept the premise underlying this argument—that aliens are more likely to leave their work than citizens—and assuming that this rationale could be logically confined to the classified competitive civil service, the State's suggestion does not withstand examination. As we stated in *Graham,* noting the general identity of an alien's obligations with those of a citizen, the " 'justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens.' " 403 U. S., at 376.

We hold that § 53, which denies all aliens the right to hold positions in New York's classified competitive civil service, violates the Fourteenth Amendment's equal protection guarantee.[12]

Because of this conclusion, we need not reach the issue whether the citizenship restriction is in conflict with Congress' comprehensive regulation of immigration and naturalization. See *Graham* v. *Richardson,* 403 U. S., at 376–380.

IV

While we rule that § 53 is unconstitutional, we do not hold that, on the basis of an individualized determination, an alien may not be refused, or discharged from,

[12] We are aware that citizenship requirements are imposed in certain aspects of the federal service. See 5 U. S. C. § 3301; Exec. Order No. 10577, 19 Fed. Reg. 7521, § 2.1 (1954); 5 CFR §§ 338.101, 302.203 (g) (1973); and, for example, Treasury, Postal Service, and General Government Appropriation Act, 1972, § 602, Pub. L. 92–49, 85 Stat. 122, and Public Works Appropriations Act, 1971, § 502, Pub. L. 91–439, 84 Stat. 902. In deciding the present case, we intimate no view as to whether these federal citizenship requirements are or are not susceptible of constitutional challenge. See *Jalil* v. *Hampton,* 148 U. S. App. D. C. 415, 460 F. 2d 923, cert. denied, 409 U. S. 887 (1972); Comment, Aliens and the Civil Service: A Closed Door?, 61 Geo. L. J. 207 (1972).

public employment, even on the basis of noncitizenship, if the refusal to hire, or the discharge, rests on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee. We hold only that a flat ban on the employment of aliens in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.

Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office. Just as "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," *Oregon* v. *Mitchell*, 400 U. S. 112, 124–125 (1970) (footnote omitted) (opinion of Black, J.); see *id.*, at 201 (opinion of Harlan, J.), and *id.*, at 293–294 (opinion of STEWART, J.), "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd* v. *Thayer*, 143 U. S. 135, 161 (1892). See *Luther* v. *Borden*, 7 How. 1, 41 (1849); *Pope* v. *Williams*, 193 U. S. 621, 632–633 (1904). Such power inheres in the State by virtue of its obligation, already noted above, "to preserve the basic conception of a political community." *Dunn* v. *Blumstein*, 405 U. S., at 344. And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. There, as Judge Lumbard phrased it in his separate concurrence, is "where citizenship bears some rational relationship to the special demands of the particular position." 339 F. Supp., at 911.

We have held, of course, that such state action, particularly with respect to voter qualifications, is not wholly immune from scrutiny under the Equal Protection Clause. See, for example, *Kramer* v. *Union School District,* 395 U. S. 621 (1969). But our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives. *Id.,* at 625; *Carrington* v. *Rash,* 380 U. S. 89, 91 (1965). This is no more than a recognition of a State's historical power to exclude aliens from participation in its democratic political institutions, *Pope* v. *Williams,* 193 U. S., at 632–634; *Boyd* v. *Thayer,* 143 U. S., at 161, and a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders.[13] U. S. Const. Art. IV, § 4; U. S. Const. Amdt. X; *Luther* v. *Borden, supra;* see *In re Duncan,* 139 U. S. 449, 461 (1891). This Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal

[13] In congressional debates leading to the adoption of the Fourteenth Amendment, there is clear evidence that Congress not only knew that as a matter of local practice aliens had not been granted the right to vote, but that under the amendment they did not receive a constitutional right of suffrage or a constitutional right to participate in the political process of state government, and that, indeed, the right to vote and the concomitant right of participation in the political process were matters of local law. Cong. Globe, 39th Cong., 1st Sess., 141–142, 2766–2767 (1866).

It is noteworthy, as well, that the 40th Congress considered and very nearly proposed a version of the Fifteenth Amendment that expressly would have prohibited discriminatory qualifications not only for voting but also for holding office. The provision was struck in conference. It is evident from the debate that, for whatever motive, its opponents wanted the States to retain control over the qualifications for office. Cong. Globe, 40th Cong., 3d Sess., at 1425–1426, 1623–1633 (1869). And, of course, the Fifteenth Amendment applies by its terms only to "citizens."

Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights. *Kramer* v. *Union School District,* 395 U. S., at 625; *Reynolds* v. *Sims,* 377 U. S. 533, 567, 568 (1964); *Harper* v. *Virginia Board of Elections,* 383 U. S. 663, 666–667 (1966); *Carrington* v. *Rash,* 380 U. S., at 91, 93–94, 96; *Lassiter* v. *Northampton Election Board,* 360 U. S. 45, 50–51 (1959); *Mason* v. *Missouri,* 179 U. S. 328, 335 (1900). A restriction on the employment of noncitizens, narrowly confined, could have particular relevance to this important state responsibility, for alienage itself is a factor that reasonably could be employed in defining "political community."

The judgment of the District Court is

Affirmed.

MR. JUSTICE REHNQUIST, dissenting.*

The Court in these two cases holds that an alien is not really different from a citizen, and that any legislative classification on the basis of alienage is "inherently suspect". The Fourteenth Amendment, the Equal Protection Clause of which the Court interprets as invalidating the state legislation here involved, contains no language concerning "inherently suspect classifications," or, for that matter, merely "suspect classifications." The principal purpose of those who drafted and adopted the Amendment was to prohibit the States from invidiously discriminating by reason of race, *Slaughter-House Cases,* 16 Wall. 36 (1873), and, because of this plainly manifested intent, classifications based on race have rightly been held "suspect" under the Amendment. But there is no language used in the Amendment, or any

*This opinion applies also to No. 71-1336, *In re Griffiths, post,* p. 717.

historical evidence as to the intent of the Framers, which would suggest to the slightest degree that it was intended to render alienage a "suspect" classification, that it was designed in any way to protect "discrete and insular minorities" other than racial minorities, or that it would in any way justify the result reached by the Court in these two cases.

Two factual considerations deserve more emphasis than accorded by the Court's opinions. First, the records in Nos. 71–1222 and 71–1336 contain no indication that the aliens suffered any disability that precluded them, either as a group or individually, from applying for and being granted the status of naturalized citizens. The appellees in No. 71–1222, as far as the record discloses, took no steps to obtain citizenship or indicate any affirmative desire to become citizens. In No. 71–1336, appellant was eligible for naturalization but "elected to remain a citizen of the Netherlands," 162 Conn. 249, 250, 294 A. 2d 281, 282, and deliberately chose not to file a declaration of intent under 8 U. S. C. §§ 1427 (f), 1430 (a). The "status" of these individuals was not, therefore, one with which they were forever encumbered; they could take steps to alter it when and if they chose.[1]

Second, the appellees in No. 71–1222 all sought to be employees of administrative agencies of the New York City government. Of the 20 members of the class repre-

[1] Although some of the members of the class had not been residents of the United States for five years at the time the complaint was filed, and therefore were ineligible to apply immediately for citizenship, 8 U. S. C. § 1427, there is no indication that these members, assuming that they are in the same "class" as the named appellees, would be prohibited from seeking citizenship status after they had resided in this country for the required period. In any event, this circumstance only underscores the fact that it is not unreasonable to assume that they have not learned about and adapted to our mores and institutions to the same extent as one who had lived here for five years would have through social contact.

sented by the named appellees, three were typists, one a "senior clerk," two "human resources technicians," three "senior human resources technicians," six "human resource specialists," three "senior human resources specialists," and two "supervising human resource specialists." The record does not reveal what functions are performed by these civil servants, although appellee Dougall apparently was the chief administrator of a program; the remaining appellees were all employees of the New York City Human Resources Administration, the governmental body with numerous employees which administers many types of social welfare programs, spending a great deal of money and dealing constantly with the public and other arms of the federal, state, and local governments.

I

The Court, by holding in these cases and in *Graham* v. *Richardson,* 403 U. S. 365 (1971), that a citizen-alien classification is "suspect" in the eyes of our Constitution, fails to mention, let alone rationalize, the fact that the Constitution itself recognizes a basic difference between citizens and aliens. That distinction is constitutionally important in no less than 11 instances in a political document noted for its brevity. Representatives, U. S. Const. Art. I, § 2, cl. 2, and Senators, Art. I, § 3, cl. 3, must be citizens. Congress has the authority "[t]o establish an uniform Rule of Naturalization" by which aliens can become citizen members of our society, Art. I, § 8, cl. 4; the judicial authority of the federal courts extends to suits involving citizens of the United States "and foreign States, Citizens or Subjects," Art. III, § 2, cl. 1, because somehow the parties are "different," a distinction further made by the Eleventh Amendment; the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments are relevant only to "citizens." The President must not only be a citizen but "a natural born

Citizen," Art. II, § 1, cl. 5. One might speculate what meaning Art. IV, § 2, cl. 1, has today.

Not only do the numerous classifications on the basis of citizenship that are set forth in the Constitution cut against both the analysis used and the results reached by the Court in these cases; the very Amendment which the Court reads to prohibit classifications based on citizenship establishes the very distinction which the Court now condemns as "suspect." The first sentence of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important. Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence. The language of that Amendment carefully distinguishes between "persons" who, whether by birth or naturalization, had achieved a certain status, and "persons" in general. That a "citizen" was considered by Congress to be a rationally distinct subclass of all "persons" is obvious from the language of the Amendment.

It is unnecessary to venture into a detailed discussion of what Congress intended by the Citizenship Clause of the Fourteenth Amendment. The paramount reason was to amend the Constitution so as to overrule explicitly the *Dred Scott* decision. *Scott* v. *Sandford,* 19 How. 393 (1857). Our decisions construing "the privileges or immunities of citizens of the United States" are not irrelevant to the question now before the Court, insofar as they recognize that there are attributes peculiar to

the status of federal citizenship. See, *e. g.*, *Slaughter-House Cases*, 16 Wall., at 79; *United States* v. *Cruikshank*, 92 U. S. 542 (1876); *Ex parte Yarbrough*, 110 U. S. 651 (1884); *Crutcher* v. *Kentucky*, 141 U. S. 47 (1891); *Logan* v. *United States*, 144 U. S. 263 (1892); *In re Quarles*, 158 U. S. 532 (1895). Cf. *Crandall* v. *Nevada*, 6 Wall. 35 (1868). Decisions of this Court holding that an alien is a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment are simply irrelevant to the question of whether that Amendment prohibits legislative classifications based upon this particular status. Since that Amendment by its own terms first defined those who had the status as a lesser included class of all "persons," the Court's failure to articulate why such classifications under the same Amendment are now forbidden serves only to illuminate the absence of any constitutional foundation for these instant decisions.

This Court has held time and again that legislative classifications on the basis of citizenship were subject to the rational-basis test of equal protection, and that the justifications then advanced for the legislation were rational. See *Clarke* v. *Deckebach*, 274 U. S. 392 (1927); *Terrace* v. *Thompson*, 263 U. S. 197 (1923); *Porterfield* v. *Webb*, 263 U. S. 225 (1923); *Webb* v. *O'Brien*, 263 U. S. 313 (1923); *Frick* v. *Webb*, 263 U. S. 326 (1923); *Patsone* v. *Pennsylvania*, 232 U. S. 138 (1914); *Blythe* v. *Hinckley*, 180 U. S. 333 (1901); *Hauenstein* v. *Lynham*, 100 U. S. 483 (1880).

This Court explicitly held that it was not a violation of the Equal Protection Clause for a State by statute to limit employment on public projects to citizens. *Heim* v. *McCall*, 239 U. S. 175 (1915); *Crane* v. *New York*, 239 U. S. 195 (1915). Even if the Court now considers that the *justifications* for those enactments are

"not controlling," those decisions clearly hold that the rational-basis test applies.

To reject the methodological approach of these decisions, the Court now relies in part on the decisions in *Truax* v. *Raich*, 239 U. S. 33 (1915), and *Takahashi* v. *Fish Comm'n*, 334 U. S. 410 (1948). In *Truax, supra*, the Court invalidated a state statute which prohibited employers of more than five persons from employing more than 20% noncitizens. The law was applicable to all businesses. In holding that the law was invalid under the Equal Protection Clause, the Court took pains to explain that the decision was not meant to disturb prior holdings, 239 U. S., at 39, and specifically noted that "it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys." *Id.*, at 40. Indeed, *Heim* and *Crane* were decided after *Truax*, as was *Clarke*, which held that a State could constitutionally prohibit aliens from engaging in certain types of businesses. If anything, *Truax* was limited by these later decisions.

Takahashi, supra, involved a statute which prohibited aliens "ineligible for citizenship" under federal law from receiving commercial fishing licenses. A State whose classification on the basis of race would have been legitimately "suspect" under the Fourteenth Amendment was in effect using Congress' power to classify in granting or withholding citizenship. The Court did not countenance this attempt at discrimination on the basis of race "by incorporation." Two features of that law should be noted. First, the statutory classification was not one involving citizens and aliens; it classified citizens and those resident aliens eligible for citizenship into one group, and resident aliens ineligible for citizenship into another. No reason for discriminating among resident aliens is apparent. Second, and most impor-

tant, is the fact that, although the Court properly refused to inquire into the legislative motive, the overwhelming *effect* of the law was to bar resident aliens of Japanese ancestry from procuring fishing licenses. The Court was not blind to this fact, or to history. See 334 U. S., at 412 n. 1, 413. The state statute that classifies aliens on the basis of country of origin is much more likely to classify on the basis of race, and thus conflict with the core purpose of the Equal Protection Clause, than a statute that, as here, merely distinguishes between alienage as such and citizenship as such. *Takahashi* did not, however, overrule previous decisions, and certainly announced no "suspect classification" rule with regard to citizen-alien classifications. To say that it did evades rather than confronts precedent.

The third, and apparently paramount, "decision" upon which the Court relied in *Graham,* and which is merely quoted in the instant decisions, is a footnote from *United States* v. *Carolene Products Co.,* 304 U. S. 144 (1938), a case involving a federal statute prohibiting the interstate shipment of filled milk. That footnote discussed the presumption of constitutionality of statutes and stated:

> "Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce* v. *Society of Sisters,* 268 U. S. 510, or national, *Meyer* v. *Nebraska,* 262 U. S. 390; *Bartels* v. *Iowa,* 262 U. S. 404; *Farrington* v. *Tokushige,* 273 U. S. 284, or racial minorities, *Nixon* v. *Herndon,* [273 U. S. 536]; *Nixon* v. *Condon,* [286 U. S. 73]; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a

correspondingly more searching judicial inquiry." *Id.*, at 152–153, n. 4.

On the "authority" of this footnote, which only four Members of the Court in *Carolene Products* joined, the Court in *Graham* merely stated that "classifications based on alienage . . . are inherently suspect" because "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." 403 U. S., at 372. As Mr. Justice Frankfurter so aptly observed:

> "A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the *Carolene* footnote did not purport to announce any new doctrine . . . ." *Kovacs* v. *Cooper*, 336 U. S. 77, 90–91 (1949) (concurring opinion).

Even if that judicial approach were accepted, however, the Court is conspicuously silent as to why that "doctrine" should apply to these cases.

The footnote itself did not refer to "searching judicial inquiry" when a classification is based on alienage, perhaps because there was a long line of authority holding such classifications entirely consonant with the Fourteenth Amendment. The "national" category mentioned involved legislative attempts to prohibit education in languages other than English, which attempts were held unconstitutional as a deprivation of "liberty" within the meaning of the Fourteenth and Fifth Amendments. These cases do not mention a "citizen-alien" distinction, nor do they support a reasoning that "nationality" is the same as "alienage."

The mere recitation of the words "insular and discrete minority" is hardly a *constitutional* reason for prohibiting state legislative classifications such as are involved here, and is not necessarily consistent with the theory

propounded in that footnote. The approach taken in *Graham* and these cases appears to be that whenever the Court feels that a societal group is "discrete and insular," it has the constitutional mandate to prohibit legislation that somehow treats the group differently from some other group.

Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find "insular and discrete" minorities at every turn in the road. Yet, unless the Court can precisely define and constitutionally justify both the terms and analysis it uses, these decisions today stand for the proposition that the Court can choose a "minority" it "feels" deserves "solicitude" and thereafter prohibit the States from classifying that "minority" differently from the "majority." I cannot find, and the Court does not cite, any constitutional authority for such a "ward of the Court" approach to equal protection.

The only other apparent rationale for the invocation of the "suspect classification" approach in these cases is that alienage is a "status," and the Court does not feel it "appropriate" to classify on that basis. This rationale would appear to be similar to that utilized in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), in which the Court cited, without discussion, *Graham*. *Id.*, at 176 n. 14. But there is a marked difference between a status or condition such as illegitimacy, national origin, or race, which cannot be altered by an individual and the "status" of the appellant in No. 71–1336 or of the appellees in No. 71–1222. There is nothing in the record indicating that their status as aliens cannot be changed by their affirmative acts.

II

In my view, the proper judicial inquiry is whether any rational justification exists for prohibiting aliens from employment in the competitive civil service and from admission to a state bar.

> "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U. S. 420, 425–426 (1961).

Before discussing this question, a preliminary reflection on the Court's opinions is warranted. Perhaps the portions of the opinions that would most disturb native-born citizens and especially naturalized citizens who have worked diligently to learn about our history, mores, and political institutions and who have successfully completed the rigorous process of naturalization, is the intimation, if not statement, that they are really not any different from aliens. The Court concludes that, because aliens residing in our country must pay taxes and some of them (but not appellant in No. 71–1336) might at one time have been subject to service in the Armed Forces, the two "groups" are indistinguishable for purposes of equal protection analysis. Compulsory military service has been ended by Congress.[2] Given the ubiquity

[2] Although stated in *Graham* and the instant cases that aliens are "like" citizens because they were subject to service in the Armed Services, none of the opinions considered in fact that Congress provided that aliens who in fact served honorably could expeditiously become citizens. 8 U. S. C. § 1440. The Court's reliance on the fact that some male aliens had to register for the draft and serve if called to suggest that aliens and citizens are "the same" neglects to consider this statute: aliens who served honorably were "like" citi-

of taxes in our present society, it is, in my opinion, totally unconvincing to attribute to their payment the leveling significance indicated by the Court. Is an alien who, after arriving from abroad in New York City, immediately purchases a pack of cigarettes, thereby paying federal, state, and city taxes, really no different from a citizen?

The opinion of the Court in No. 71–1222 would appear to answer this question in the negative, but it then proceeds to state that there is a difference between aliens and citizens for purposes of participation and service in the political arenas. Unless the Court means that citizenship only has meaning in a political context, the analytical approach of the Court is less than clear, hardly convincing, and curiously conflicts with the high nonpolitical value that the Court has heretofore ascribed to citizenship. If citizenship is not "special," the Court has wasted a great deal of effort in the past. Cf. *Afroyim* v. *Rusk*, 387 U. S. 253 (1967); *Trop* v. *Dulles*, 356 U. S. 86 (1958).

These statutes do not classify on the basis of country of origin; the distinctions are not between native Americans and "foreigners," but between citizens and aliens. The process of naturalization was specifically designed by Congress to require a foreign national to demonstrate that he or she is familiar with the history, traditions, and institutions of our society in a way that a native-born citizen would learn from formal education and basic social contact. Congress specifically provided that an alien seeking citizenship status must demonstrate "an understanding of the English language" and "a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United

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zens in that they demonstrated, like citizens, a commitment to our society that Congress believed warranted, other considerations aside, their immediate, formal acceptance into our society.

States." 8 U. S. C. § 1423. The purpose was to make the alien establish that he or she understood, and could be integrated into, our social system.

> "Through the system of citizenship classes sponsored by the Immigration and Naturalization Service and the local school system, the alien is aided in preparing himself for citizenship, and every effort is made to give him *fundamental and uniform knowledge of our political and social structure. In order that he may intelligently use this fundamental and uniform knowledge and so that he may be a complete and thoroughly integrated member of our American society,* the committee [House Judiciary Committee] feels that he should have a basic knowledge of the common language of the country and be able to read, write, and speak it with reasonable facility." H. R. Rep. No. 1365, 82d Cong., 2d Sess., 78 (1952) (emphasis added).

See also 8 U. S. C. § 1424, which precludes aliens who manifest certain opposition to our society or form of government from being naturalized. An alien must demonstrate "good moral character," 8 U. S. C. § 1427 (a)(3), which was intended by Congress to mean a broad "attach[ment] to the principles of the Constitution of the United States, and [disposition] to the good order and happiness of the United States." H. R. Rep. No. 1365, *supra,* at 80. See also 8 CFR § 332b (1973), detailing the cooperation between the Immigration and Naturalization Service and local schools conducting citizenship education for applicants for naturalization. The above is sufficient to demonstrate, I believe, that Congress provided that aliens seeking citizenship status prove what citizens by birth are, as a class, presumed to understand: a basic familiarity with our social and political mores and institutions. The naturalized citizen has dem-

onstrated both the willingness and ability to integrate into our social system as a whole, not just into our "political community," as the Court apparently uses the term. He proved that he has become "like" a native-born citizen in ways that aliens, as a class, could be presumed not to be. The Court simply ignores the purpose of the process of assimilation into and dedication to our society that Congress prescribed to make aliens "like" citizens.

In No. 71–1222, I do not believe that it is irrational for New York to require this class of civil servants to be citizens, either natural born or naturalized. The proliferation of public administration that our society has witnessed in recent years, as a result of the regulation of conduct and the dispensation of services and funds, has vested a great deal of *de facto* decisionmaking or policymaking authority in the hands of employees who would not be considered the textbook equivalent of policymakers of the legislative or "top" administrative variety. Nevertheless, as far as the private individual who must seek approval or services is concerned, many of these "low level" civil servants are in fact policymakers. *Goldberg* v. *Kelly,* 397 U. S. 254 (1970), implicitly recognized that those who apply facts to individual cases are as much "governors" as those who write the laws or regulations the "low-level" administrator must "apply." Since policymaking for a political community is not necessarily the exclusive preserve of the legislators, judges, and "top" administrators, it is not irrational for New York to provide that only citizens should be admitted to the competitive civil service.

But the justification of efficient government is an even more convincing rationale. Native-born citizens can be expected to be familiar with the social and political institutions of our society; with the society and political mores that affect how we react and interact

with other citizens. Naturalized citizens have also demonstrated their willingness to adjust to our patterns of living and attitudes, and have demonstrated a basic understanding of our institutions, system of government, history, and traditions. It is not irrational to assume that aliens as a class are not familiar with how we as individuals treat others and how we expect "government" to treat us. An alien who grew up in a country in which political mores do not reject bribery or self-dealing to the same extent that our culture does; in which an imperious bureaucracy historically adopted a complacent or contemptuous attitude toward those it was supposed to serve; in which fewer if any checks existed on administrative abuses; in which "low-level" civil servants serve at the will of their superiors—could rationally be thought not to be able to deal with the public and with citizen civil servants with the same rapport that one familiar with our political and social mores would, or to approach his duties with the attitude that such positions exist for service, not personal sinecures of either the civil servant or his or her superior. These considerations could rationally be expected to influence how an administrator in charge of a program, such as appellee Dougall, made decisions in allocating funds, hiring or dealing with personnel, or decisionmaking, or how a lower level civil servant, such as appellee Jorge, was able to perform with and for fellow workers and superiors, even if she had no direct contact with the public. All these factors could materially affect the efficient functioning of the city government, and possibly as well the very integrity of that government. Such a legislative purpose is clearly not irrational.

In No. 71–1336 the answer is not as clearcut. The States traditionally have had great latitude in prescribing rules and regulations concerning technical competence and character fitness, governing those who seek to be ad-

mitted to practice law. See, *e. g.*, *Konigsberg* v. *State Bar of California*, 366 U. S. 36 (1961). The importance of lawyers and the judiciary in our system of government and justice needs no extended comment. An attorney is an "officer of the court" in Connecticut, a status this Court has also recognized. See, *e. g.*, *Powell* v. *Alabama*, 287 U. S. 45, 73 (1932); *Ex parte Garland*, 4 Wall. 333, 370 (1867). He represents his client, but also, in Connecticut, may "sign writs and subpoenas, take recognizances, [and] administer oaths." Conn. Gen. Stat. Rev. § 51–85.

More important than these emoluments of their position, though, is the tremendous responsibility and trust that our society places in the hands of lawyers. The liberty and property of the client may depend upon the competence and fidelity of the representation afforded by the lawyer in any number of particular lawsuits. But by virtue of their office lawyers are also given, and have increasingly undertaken to exercise, authority to seek to alter some of the social relationships and institutions of our society by use of the judicial process. No doubt an alien even under today's decision may be required to be learned in the law and familiar with the language spoken in the courts of the particular State involved. But Connecticut's requirement of citizenship reflects its judgment that something more than technical skills are needed to be a lawyer under our system. I do not believe it is irrational for a State that makes that judgment to require that lawyers have an understanding of the American political and social experience, whether gained from growing up in this country, as in the case of a native-born citizen, or from the naturalization process, as in the case of a foreign-born citizen. I suppose the Connecticut Bar Examining Committee could itself administer tests in American history, government, and so-

ciology, but the State did not choose to go this route. Instead, it chose to operate on the assumption that citizens as a class might reasonably be thought to have a significantly greater degree of understanding of our experience than would aliens. Particularly in the case of one such as appellant, who candidly admits that she wants to live and work in the United States but does not want to sever her fundamental social and political relationship with the country of her birth, I do not believe the State's judgment is irrational.

I would therefore reverse the judgment in No. 71–1222 and affirm that in No. 71–1336.

GOSA *v.* MAYDEN, WARDEN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71–6314. Argued December 4, 1972—Decided June 25, 1973.*

In No. 71–6314, petitioner was tried by court-martial and convicted of rape. His conviction was affirmed by the Air Force Board of Review, and the Court of Military Appeals denied a petition for review. At no time during the trial and review proceedings did petitioner question the jurisdiction of the military tribunal. Thereafter, following the decision in *O'Callahan* v. *Parker*, 395 U. S. 258 (holding that when a serviceman is charged with a crime that is not "service connected" he is entitled to indictment by a grand jury and trial by jury in a civilian court), petitioner sought a writ of habeas corpus in Federal District Court which was denied, the court concluding that the standards promulgated in *Stovall* v. *Denno*, 388 U. S. 293, precluded retroactive application of *O'Callahan*. On appeal, in face of the Government's concession that the offense was not service connected, the Court of Appeals affirmed. In No. 71–1398, respondent, while absent without leave in 1944, was apprehended in Pennsylvania while in an automobile stolen in New Jersey. He was tried by court-martial in New York on charges of unauthorized absence from his duty station during wartime and theft of an automobile from a civilian. He pleaded guilty, and after serving two years' confinement was dishonorably discharged in 1946. He instituted suit in 1970, relying on *O'Callahan*, seeking to compel the Secretary of the Navy to overturn his court-martial conviction for auto theft and to correct his military records with respect to his dishonorable discharge. The District Court held that the car theft was not service connected in the *O'Callahan* sense and that *O'Callahan* was to be applied retroactively. The Court of Appeals affirmed. *Held:* The judgment in No. 71–6314 is affirmed, and the judgment in No. 71–1398 is reversed. Pp. 672–693.

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*Together with No. 71–1398, *Warner, Secretary of the Navy* v. *Flemings*, on certiorari to the United States Court of Appeals for the Second Circuit.

No. 71–6314, 450 F. 2d 753, affirmed; No. 71–1398, 458 F. 2d 544, reversed.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE POWELL, concluded that:

1. The question in *O'Callahan* was the appropriateness of the exercise of jurisdiction by a military forum, pursuant to an Act of Congress, over a nonservice-connected offense when balanced against the guarantees of the Fifth and Sixth Amendments. Pp. 672–678.

2. Application of the three-pronged test of *Stovall* v. *Denno*, *supra*, "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards," requires that *O'Callahan* be accorded prospective effect only. Pp. 678–685.

3. Respondent's claim in No. 71–1398 that he was deprived of the right to trial in the vicinage, as guaranteed by Art. III, § 2, cl. 3, not raised before the military court, lacks merit. General court-martial jurisdiction, derived from Art. I, is not restricted territorially to a particular State or district; the vicinage requirement has primary relevance to trial by jury; and respondent has not demonstrated prejudice. Pp. 685–686.

MR. JUSTICE DOUGLAS concluded, in No. 71–6314, that the case should be reargued on the question whether the "jurisdiction" of the military tribunal, not having been initially contested, had become *res judicata;* and in No. 71–1398, that respondent committed a "service connected" crime. Pp. 686–691.

MR. JUSTICE REHNQUIST concluded, in No. 71–6314, that although the prior Court decisions do not support the holding that *O'Callahan* should not be applied retroactively, *O'Callahan* was wrongly decided and should be overruled; and, in No. 71–1398, that any crime committed by a serviceman during the time of declared war is "service connected" and that he can be validly tried by court-martial for that offense. P. 692.

MR. JUSTICE STEWART concluded, in No. 71–1398, that respondent, a serviceman who deserted his post during a time of congressionally declared war and stole an automobile was guilty of a "service connected" offense and was properly tried before a court-martial under *O'Callahan*. P. 693.

BLACKMUN, J., announced the Court's judgments and delivered an opinion, in which BURGER, C. J., and WHITE and POWELL, JJ., joined. REHNQUIST, J., filed an opinion concurring in the judgments, *post*, p. 692. DOUGLAS, J., filed an opinion concurring in the result in part in No. 71–6314, and concurring in the result in No. 71–1398, *post*, p. 686. STEWART, J., filed an opinion concurring in the result in No. 71–1398, in which DOUGLAS, J., joined, and dissenting in No. 71–6314, *post*, p. 693. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in which STEWART, J., joined as it applies to No. 71–6314, *post*, p. 693.

Solicitor General Griswold argued the cause for petitioner in No. 71–1398 and for respondent in No. 71–6314. With him on the briefs in both cases were *Assistant Attorney General Petersen, Deputy Solicitor General Lacovara, William Bradford Reynolds,* and *Roger A. Pauley. John R. Saalfield* argued the cause for petitioner in No. 71–6314. On the brief was *H. Franklin Perritt, Jr.*

Michael Meltsner, by appointment of the Court, 408 U. S. 919, argued the cause and filed a brief for respondent in No. 71–1398.†

MR. JUSTICE BLACKMUN announced the judgments of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE POWELL join.

In *O'Callahan* v. *Parker*, 395 U. S. 258, decided June 2, 1969, this Court, by a 5–3 vote, held that when a person in military service is charged with a crime that is not "service connected," *id.*, at 272, the defendant is entitled, despite his military status, to the benefit of "two important constitutional guarantees," *id.*, at 273,

†*Rowland Watts* filed a brief for the Workers Defense League as *amicus curiae* urging reversal in No. 71–6314 and affirmance in No. 71–1398.

namely, indictment by a grand jury [1] and trial by jury in a civilian court.

The Court noted that O'Callahan was "properly absent from his military base when he committed the crimes with which he is charged," *ibid.;* that there was no connection between his military duties and the crimes; that the offenses were committed off the military post or enclave; that the victim was not performing any duty relating to the military; that the situs of the crimes was not occupied territory or under military control; that they were peacetime offenses; that the civilian courts were open; and that the offenses involved no question of the flouting of military authority, post security, or the integrity of military property.

Later, in *Relford* v. *Commandant,* 397 U. S. 934 (1970), we granted certiorari "limited to retroactivity and scope of *O'Callahan* v. *Parker.*" When *Relford* was decided, 401 U. S. 355 (1971), we held that an offense committed on a military post by an individual in service, in violation of the security of another person or property on that post, was "service connected," within *O'Callahan*'s language. Relford's offenses so qualified. His case, thus, went off on the scope of *O'Callahan* and did not reach the issue of retroactivity. We concluded that the latter issue, although having "important dimensions, both direct and collateral," was "better resolved in other litigation where, perhaps, it would be solely dispositive of the case." *Id.,* at 370. One of the cases, *Gosa,* now before us presents that issue solely. The other case, *Flemings,* presents the issue, but not solely.

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[1] The Court, of course, has not yet held the indictment requirement of the Fifth Amendment to be binding upon the States. *Hurtado* v. *California,* 110 U. S. 516 (1884); *Gaines* v. *Washington,* 277 U. S. 81, 86 (1928); *Branzburg* v. *Hayes,* 408 U. S. 665, 688 n. 25 (1972).

I

No. 71–6314. In December 1966 petitioner James Roy Gosa, an airman third class, stationed at Warren Air Force Base in Wyoming, was tried by a court-martial and convicted of rape, in violation of Art. 120 of the Uniform Code of Military Justice, 10 U. S. C. § 920.

The offense took place the preceding August, in what the respondent has stated to be peacetime,[2] when Gosa was in the city of Cheyenne. At the time, he was officially off duty and absent from the base on authorized leave. He was not in uniform. The victim was not connected with the military or related to military personnel. Shortly after the incident Gosa was arrested by civilian authorities. He was unable to make bond and was detained pending a preliminary hearing. The complaining witness did not appear at the hearing. Gosa, accordingly, was released. He was taken into military custody, however, and charged with the Art. 120 violation. A general court-martial was convened. Gosa was tried and convicted. He was sentenced to 10 years' imprisonment at hard labor, forfeiture of pay and allowances, reduction in rank to the lowest pay grade of airman basic, and a bad conduct discharge. As required by Art. 61 of the Code, 10 U. S. C. § 861, the convening authority then referred the case to his staff judge advocate for review. The staff judge advocate's recommendation that the findings and sentence of the general court-martial be approved were adopted by the convening authority. Pursuant to Art. 66 of the Code, 10 U. S. C. § 866, the case was referred to an Air Force Board of Review. That Board affirmed the conviction and sentence. On August 16, 1967, the United States Court of Military Appeals denied a petition for review. 17 U. S.

[2] Tr. of Oral Arg. 16.

C. M. A. 648. The case thereupon became final, Art. 76 of the Code, 10 U. S. C. § 876, subject, of course, to the habeas corpus exception recognized in *United States* v. *Augenblick,* 393 U. S. 348, 349–350 (1969).

At no time throughout the trial and the review proceedings did Gosa raise any question as to the power of the military tribunal to try him.

Following the Court's decision in *O'Callahan,* Gosa filed an application for a writ of habeas corpus in the United States District Court for the Northern District of Florida seeking his release from the Federal Correctional Institution at Tallahassee where he was then confined.[3] Subsequently, he filed with the United States Court of Military Appeals a motion to vacate his sentence and conviction; this was treated as a petition for reconsideration and was denied by a divided vote with accompanying opinions. 19 U. S. C. M. A. 327, 41 C. M. R. 327 (1970). The habeas application also was denied by the District Court upon its determination that the standards promulgated in *Stovall* v. *Denno,* 388 U. S. 293, 297 (1967), and related cases, precluded retroactive application of *O'Callahan.* 305 F. Supp. 1186 (ND Fla. 1969). On appeal, in the face of a Government concession that the alleged offense was not service connected, the Court of Appeals for the Fifth Circuit, one judge dissenting, affirmed. 450 F. 2d 753 (1971).

No. 71–1398. In 1944, when the United States was formally at war, respondent James W. Flemings, then age 18 and a seaman second class, was stationed at the Naval Ammunition Depot in New Jersey. On August 7 of that year Flemings failed to return on time from an

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[3] Gosa has since been released. Inasmuch as the District Court possessed federal habeas jurisdiction when Gosa's application was filed, that jurisdiction was not defeated by his release prior to the completion of proceedings on the application. *Carafas* v. *LaVallee,* 391 U. S. 234, 238–240 (1968).

authorized three-day leave. He was apprehended by Pennsylvania police while he was in an automobile stolen two days earlier in Trenton, New Jersey. Flemings was turned over to military authorities. He was charged with unauthorized absence from his duty station during wartime and with theft of an automobile "from the possession of . . . a civilian." [4]

A court-martial was convened at the Brooklyn Navy Yard. Flemings, represented by a reserve lieutenant, pleaded guilty to the two charges. He was sentenced to three years' imprisonment, reduction in rank to apprentice seaman, and dishonorable discharge. After two years' confinement he was released and was dishonorably discharged in October 1946.

In 1970, Flemings instituted suit in the United States District Court for the Eastern District of New York, relying on *O'Callahan* and seeking to compel the Secretary of the Navy to overturn the 1944 court-martial conviction for auto theft and to correct his military records with respec to the dishonorable discharge. He did not challenge the validity of his conviction for being absent without leave.

The District Court held that the auto theft offense was not service connected in the *O'Callahan* sense and that *O'Callahan* was to be applied retroactively to invalidate the court-martial conviction on that charge. 330 F. Supp. 193 (1971). The Court of Appeals for the Second Circuit affirmed. 458 F. 2d 544 (1972).

We granted certiorari in both cases to resolve the conflict. 407 U. S. 920 and 919 (1972).[5]

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[4] It appears that the automobile was owned by a member of the Signal Corps but that the car was being used by him on a purely personal errand when it was stolen. The owner was not compensated by the military for its use.

[5] See also *Schlomann* v. *Moseley*, 457 F. 2d 1223 (CA10 1972), cert. denied, *post*, p. 919; *Thompson* v. *Parker*, 308 F. Supp. 904, 907–908 (MD Pa.), appeal dismissed (No. 18868, CA3 1970); and

II

O'Callahan v. *Parker*, to use the words MR. JUSTICE STEWART employed in *Desist* v. *United States*, 394 U. S. 244, 248 (1969), was "a clear break with the past." In *O'Callahan* the Court concluded that, in harmonizing

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Mercer v. *Dillon*, 19 U. S. C. M. A. 264, 265, 41 C. M. R. 264, 265 (1970), where the Court of Military Appeals confined the application of *O'Callahan* to those convictions that were not final when *O'Callahan* was decided on June 2, 1969.

Scholarly comment on *O'Callahan* retrospectivity is divided. The following predict or favor nonretroactivity: Everett, *O'Callahan* v. *Parker*—Milestone or Millstone in Military Justice?, 1969 Duke L. J. 853, 886–889; Nelson & Westbrook, Court-Martial Jurisdiction Over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker, 54 Minn. L. Rev. 1, 39–46 (1969); Note, Military Law-Constitutional Law-Court-Martial Jurisdiction Limited to "Service-Connected" cases, 44 Tulane L. Rev. 417, 423–424 (1970); Note, RETROACTIVITY-Military Jurisdiction-Military Convictions for Nonservice-Connected Offenses Should Be Vacated Retroactively, 50 Tex. L. Rev. 405 (1972); Note, CONSTITUTIONAL LAW-Retroactivity of *O'Callahan* v. *Parker*, 47 St. John's L. Rev. 235 (1972); Note, The Sword and Nice Subtleties of Constitutional Law: *O'Callahan* v. *Parker*, 3 Loyola U. (L. A.) L. Rev. 188, 198 n. 67 (1970); Comment, Courts Martial-Jurisdiction-Service-Connected Crime, 21 S. C. L. Rev. 781, 793–794 (1969). The following predict or favor retroactivity: Blumenfeld, Retroactivity After O'Callahan: An Analytical and Statistical Approach, 60 Geo. L. J. 551 (1972); Wilkinson, The Narrowing Scope of Court-Martial Jurisdiction: *O'Callahan* v. *Parker*, 9 Washburn L. J. 193, 197–201 (1970); Higley, O'Callahan Retroactivity: An Argument for the Proposition, 27 JAG J. 85, 96–97 (1972); Note, *O'Callahan* v. *Parker*, A Military Jurisdictional Dilemma, 22 Baylor L. Rev. 64, 75 (1970); Note, Denial of Military Jurisdiction over Servicemen's Crimes Having No Military Significance and Cognizable in Civilian Courts, 64 Nw. U. L. Rev. 930, 938 (1970). See Birnbaum & Fowler, *O'Callahan* v. *Parker:* The *Relford* Decision and Further Developments in Military Justice, 39 Ford. L. Rev. 729, 739–742 (1971).

A compilation of general comments on *O'Callahan* appears in *Relford* v. *Commandant*, 401 U. S. 355, 356 n. 1 (1971).

the express guarantees of the Fifth and Sixth Amendments, with respect to grand jury indictment and trial by a civilian jury, with the power of Congress, under Art. I, § 8, cl. 14, of the Constitution, "To make Rules for the Government and Regulation of the land and naval Forces," a military tribunal ordinarily may not try a serviceman charged with a crime that has no service connection. Although the Court in *O'Callahan* did not expressly overrule any prior decision, it did announce a new constitutional principle, and it effected a decisional change in attitude that had prevailed for many decades. The Court long and consistently had recognized that military status in itself was sufficient for the exercise of court-martial jurisdiction. *Kinsella* v. *Singleton,* 361 U. S. 234, 240–241, 243 (1960); *Reid* v. *Covert,* 354 U. S. 1, 22–23 (1957); *Grafton* v. *United States,* 206 U. S. 333, 348 (1907); *Johnson* v. *Sayre,* 158 U. S. 109, 114 (1895); *Smith* v. *Whitney,* 116 U. S. 167, 184–185 (1886); *Coleman* v. *Tennessee,* 97 U. S. 509 (1879); *Ex parte Milligan,* 4 Wall. 2, 123 (1866). Indeed, in *Grafton,* 206 U. S., at 348, the Court observed, "While . . . the jurisdiction of general courts-martial extends to all crimes, not capital, committed against public law by an officer or soldier of the Army within the limits of the territory in which he is serving, this jurisdiction is not exclusive, but only concurrent with that of the civil courts."

The new approach announced in *O'Callahan* was cast, to be sure, in "jurisdictional" terms, but this was "lest 'cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger,' as used in the Fifth Amendment, be expanded to deprive every member of the armed services of the benefits of an indictment by a grand jury and a trial by a jury of his peers" (footnote omitted). 395 U. S., at 272–273. The Court went on to emphasize that the "power of Congress to make 'Rules for the Government and Regu-

lation of the land and naval Forces,' Art. I, § 8, cl. 14, need not be sparingly read in order to preserve those two important constitutional guarantees. For it is assumed that an express grant of general power to Congress is to be exercised in harmony with express guarantees of the Bill of Rights." *Id.*, at 273. The basis for the "jurisdictional" holding in *O'Callahan* obviously was the increasing awareness and recognition of the important constitutional values embodied in the Fifth and Sixth Amendments. Faced with the need to extend the protection of those Amendments as widely as possible, while at the same time respecting the power of Congress to make "Rules for the Government and Regulation of the land and naval Forces," the Court, *id.*, at 265, heeded the necessity for restricting the exercise of jurisdiction by military tribunals to those crimes with a service connection as an appropriate and beneficial limitation "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Toth* v. *Quarles*, 350 U. S. 11, 22 (1955).

That *O'Callahan* dealt with the appropriate exercise of jurisdiction by military tribunals is apparent from *Kinsella* v. *Singleton*, *supra*, where the Court ruled that the Necessary and Proper Clause, Art. I, § 8, cl. 18, does not enable Congress to broaden the term "land and naval Forces" in Art. I, § 8, cl. 14, to include a civilian dependent accompanying a member of the Armed Forces overseas. In such a case, it was held, a civilian dependent is entitled to the safeguards of Art. III and of the Fifth and Sixth Amendments, and conviction by court-martial is not constitutionally permissible:

> "But the power to 'make Rules for the Government and Regulation of the land and naval Forces' bears no limitation as to offenses. The power there

> granted includes not only the creation of offenses but the fixing of the punishment therefor. If civilian dependents are included in the term 'land and naval Forces' at all, they are subject to the full power granted the Congress therein to create capital as well as noncapital offenses. This Court cannot diminish and expand that power, either on a case-by-case basis or on a balancing of the power there granted Congress against the safeguards of Article III and the Fifth and Sixth Amendments. Due process cannot create or enlarge power. . . . It deals neither with power nor with jurisdiction, but with their exercise." 361 U. S., at 246.

Although the decision in *O'Callahan* emphasizes the difference in procedural protections respectively afforded by the military and the civilian tribunals, the Court certainly did not hold, or even intimate, that the prosecution in a military court of a member of the Armed Services for a nonservice-connected crime was so unfair as to be void *ab initio*. Rather, the prophylactic rule there formulated "created a protective umbrella serving to enhance" a newly recognized constitutional principle. *Michigan* v. *Payne*, 412 U. S. 47, 54 (1973). That recognition and effect are given to a theretofore unrecognized and uneffectuated constitutional principle does not, of course, automatically mandate retroactivity. In *Williams* v. *United States*, 401 U. S. 646, 651 (1971), MR. JUSTICE WHITE made it clear, citing *Linkletter* v. *Walker*, 381 U. S. 618 (1965), that the Court has "firmly rejected the idea that all new interpretations of the Constitution must be considered always to have been the law and that prior constructions to the contrary must always be ignored." See *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374 (1940). And in *Johnson* v. *New Jersey*, 384 U. S. 719, 728 (1966),

it was said that "the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved."

Duncan v. *Louisiana*, 391 U. S. 145 (1968), and *Bloom* v. *Illinois*, 391 U. S. 194 (1968), are illustrative of the context of the *O'Callahan* decision. In *Duncan*, the Court held that since "trial by jury in criminal cases is fundamental to the American scheme of justice, . . . the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee" (footnote omitted). 391 U. S., at 149. In *Bloom* the Court held that serious criminal contempts may not be summarily punished and that they are subject to the Constitution's jury trial provision. 391 U. S., at 201–210. In those two cases the Court ruled that a state court exercising jurisdiction over a defendant in a serious criminal or criminal contempt case, but failing to honor a request for a jury trial, in effect was without jurisdiction. Yet in *DeStefano* v. *Woods*, 392 U. S. 631 (1968), the Court by a *per curiam* opinion, denied retroactive application to those new constitutional holdings. The Court thus concluded that it did not follow that every judgment rendered in a *Duncan* or in a *Bloom* situation, prior to the decisions in those cases, was so infected by unfairness as to be null and void.

The same analysis has pertinent application to these very similar cases, and it leads us to the conclusion that the validity of convictions by military tribunals, now said to have exercised jurisdiction inappropriately over non-service-connected offenses is not sufficiently in doubt so as to require the reversal of all such convictions rendered since 1916 when Congress provided for military trials for civilian offenses committed by persons in the Armed Services. Act of Aug. 29, 1916, c. 418, 39 Stat. 652.

The clearly opposing and contrasting situation is provided by the argument made by respondent Flemings to the effect that the retroactivity of *O'Callahan* is to be determined and is controlled by *United States* v. *U. S. Coin & Currency*, 401 U. S. 715 (1971). In that case the Court held that its decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), and *Grosso* v. *United States*, 390 U. S. 62 (1968), precluding the criminal conviction of a gambler who properly asserted his Fifth Amendment privilege against self-incrimination as a reason for his failure to register and to pay the federal gambling tax, would be applied retroactively so as to invalidate forfeiture proceedings under 26 U. S. C. § 7302 ensuing upon the invalid conviction. To suggest that *Coin & Currency* is controlling is to ignore the important distinction between that case and these. There the Court determined that retrospective application of *Marchetti* and *Grosso* was required because they "dealt with the kind of conduct that cannot constitutionally be punished in the first instance," 401 U. S., at 723; it was conduct "constitutionally immune from punishment" in any court. *Id.*, at 724.

In *O'Callahan*, on the other hand, the offense was one for which the defendant was not so immune in any court. The question was not whether O'Callahan could have been prosecuted; it was, instead, one related to the forum, that is, whether, as we have said, the exercise of jurisdiction by a military tribunal, pursuant to an act of Congress, over his nonservice-connected offense was appropriate when balanced against the important guarantees of the Fifth and Sixth Amendments. The Court concluded that in the circumstances there presented the exercise of jurisdiction was not appropriate, and fashioned a rule limiting the exercise of court-martial jurisdiction in order to protect the rights to indictment and jury trial. The Court did not hold that a military

tribunal was and always had been without authority to exercise jurisdiction over a nonservice-connected offense.

III

The foregoing conclusion, of course, does not end our inquiry as to whether *O'Callahan* should be accorded retroactive application.

In two cases decided earlier this Term, retrospectivity of a new constitutional decision was also an issue. *Robinson* v. *Neil*, 409 U. S. 505 (1973), concerned successive municipal and state prosecutions for alleged offenses arising from the same circumstances, and a claim of double jeopardy, based on this Court's intervening decisions in *Benton* v. *Maryland*, 395 U. S. 784 (1969), and *Waller* v. *Florida*, 397 U. S. 387 (1970). We recognized that in *Linkletter* the Court was "charting new ground" in the retrospectivity area, 409 U. S., at 507, that "*Linkletter* and succeeding cases," *ibid.*, obviously including *Stovall* v. *Denno*, 388 U. S., at 297, established standards for determining retroactivity; that *Robinson*, however, did not readily lend itself to the *Linkletter* analysis; that *Linkletter* and its related cases dealt with procedural rights and trial methods; and that guarantees not related to procedural rules "cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis." *Robinson* v. *Neil*, 409 U. S., at 508.

In *Michigan* v. *Payne*, 412 U. S. 47 (1973), we were concerned with the retroactivity of *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), and the standards it promulgated with respect to an increased judge-imposed sentence on retrial after a successful appeal. We there employed the *Stovall* criteria and held that *Pearce* was not to be applied retroactively.

In the present cases we are not concerned, of course, with procedural rights or trial methods, as is exemplified by the decisions concerning the exclusionary rule (*Link-*

letter), the right of confrontation (*Stovall*), adverse comment on a defendant's failure to take the stand (*Tehan* v. *Shott*, 382 U. S. 406 (1966)), and a confession's admissibility (*Johnson* v. *New Jersey*, 384 U. S. 719 (1966)). But neither are we concerned, as we were in *Robinson*, with a constitutional right that operates to prevent another trial from taking place at all. Our concern, instead, is with the appropriateness of the exercise of jurisdiction by a military forum.

These cases, therefore, closely parallel *DeStefano* v. *Woods*, *supra*, where the Court denied retroactive application to *Duncan* v. *Louisiana*, *supra*, and *Bloom* v. *Illinois*, *supra*, in each of which a right to a jury trial had been enunciated. In denying retroactivity, the integrity of each of the earlier proceedings, without a jury, was recognized. The test applied in *DeStefano* was the *Stovall* test. 392 U. S., at 633–635. Similarly here, then, the three-prong test of *Stovall* has pertinency, and we proceed to measure Gosa's and Flemings' claims by that test directed to "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 388 U. S., at 297.

A. *Purpose.* "Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist* v. *United States*, 394 U. S. 244, 249 (1969). In his opinion for the plurality in *Williams* v. *United States*, 401 U. S., at 653, MR. JUSTICE WHITE emphasized that where "the major purpose of new constitutional doctrine is to overcome" a trial aspect "that substantially impairs its truth-finding function," the new rule is given complete retroactive effect, and "[n]either good-faith reliance" nor "severe impact on the administration of justice" suffices to require prospectivity.

Our initial concern, therefore, is whether the major purpose of the holding in *O'Callahan* was to overcome an aspect of military trials which substantially impaired the truth-finding process and brought into question the accuracy of all the guilty verdicts rendered by military tribunals. At the same time, however, the fact that a new rule tends incidentally to improve or enhance reliability does not in itself mandate the rule's retroactive application. The Court in *Johnson* v. *New Jersey*, 384 U. S., at 728, repeated what had been suggested in *Linkletter* and *Tehan*, that "we must determine retroactivity 'in each case' by looking to the peculiar traits of the specific 'rule in question' " and

> "[f]inally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. . . . We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial." 384 U. S., at 728–729.

See *Michigan* v. *Payne*, 412 U. S., at 55. Thus, retroactivity is not required by a determination that the old standard was not the most effective vehicle for ascertaining the truth, or that the truth-determining process has been aided somewhat by the new standard, or that one of several purposes in formulating the new standard was to prevent distortion in the process.

Although the opinion in *O'Callahan* was not uncritical of the military system of justice, and stressed possible command influence and the lack of certain procedural safeguards, 395 U. S., at 263–266, the decision there, as has been pointed out above, certainly was not based on any conviction that the court-martial lacks fundamental

integrity in its truth-determining process.[6] Indeed, our subsequent ruling in *Relford* itself indicates our conclusion that military criminal proceedings are not basically unfair, for *Relford* clearly approves prosecution in a military court, of what is otherwise a civilian crime, when factors are present that establish the offense's "service connection." 401 U. S., at 364–365. See Mr. Chief Justice Warren's paper, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 188–189 (1962).

It, of course, would demean the constitutional rights to indictment and trial by a jury to assert that those guarantees do not play some role in assuring the integrity of the truth-determining process. "[T]he right to jury trial generally tends to prevent arbitrariness and repression." *DeStefano* v. *Woods*, 392 U. S., at 633. The same mission is fulfilled by the indictment right. But a policy directed at the prevention of arbitrariness and repression is not confined to the truth-determining process. It is concerned, as well, with a larger range of possible evils: prosecution that is malicious, prosecutorial overzealousness, excessiveness of sentence, and the like. These very ingredients were also present in the back-

[6] There are some protections in the military system not afforded the accused in the civilian counterpart. For example, Art. 32 of the Code, 10 U. S. C. § 832, requires "thorough and impartial investigation" prior to trial, and prescribes for the accused the rights to be advised of the charge, to have counsel present at the investigation, to cross-examine adverse witnesses there, and to present exonerating evidence. It is not difficult to imagine, also, the situation where a defendant, who is in service, may well receive a more objective hearing in a court-martial than from a local jury of a community that resents the military presence.

The Uniform Code of Military Justice was not in effect when Flemings was charged and pleaded guilty. But the fact that his proceeding took place under the present Code's predecessor is no inevitable indication of basic unfairness. See *Burns* v. *Wilson*, 346 U. S. 137 (1953).

ground in *Duncan* and *Bloom*. Yet, the Court did not find it necessary to hold retroactive the rights newly established by those cases.

Nothing said in *O'Callahan* indicates that the major purpose of that decision was to remedy a defect in the truth-determining process in the military trial. Rather, the broad guarantees of the Fifth Amendment right to grand jury indictment and the Sixth Amendment right to jury trial weighed heavily in the limitation of the exercise of court-martial jurisdiction to "'*the least possible power adequate to the end proposed,*'" *Toth* v. *Quarles*, 350 U. S. 11, 23 (1955), a phrase taken from *Anderson* v. *Dunn*, 6 Wheat. 204, 231 (1821).

The purpose behind the rule enunciated in *O'Callahan* thus does not mandate retroactivity.

B. *Reliance.* With respect to this factor, we repeat what has been emphasized above, namely, that, before *O'Callahan*, the law was settled that the exercise of military jurisdiction over an offense allegedly committed by a member of the Armed Forces was appropriately based on the military status of the defendant and was not dependent on the situs or nature of the offense. There was justifiable and extensive reliance by the military and by all others on the specific rulings of this Court. Military authorities were acting appropriately pursuant to provisions of the Uniform Code of Military Justice, Art. 2, 10 U. S. C. § 802, and its predecessors, and could not be said to be attempting to usurp civilian authority. The military is not to be faulted for its reliance on the law as it stood before *O'Callahan* and for not anticipating the "clear break with the past" that *O'Callahan* entailed. The reliance factor, too, favors prospectivity.

C. *Effect on the Administration of Justice.* In *DeStefano* v. *Woods*, 392 U. S., at 634, the Court, in considering the retroactivity of *Duncan* and *Bloom*, at-

tached special significance to the fact that "the effect of a holding of general retroactivity on law enforcement and the administration of justice would be significant, because the denial of jury trial has occurred in a very great number of cases." The very same factor is present with like significance here, for the military courts have been functioning in this area since 1916, appropriately assuming from this Court's successive holdings, that they were properly exercising jurisdiction in cases concerning nonservice-connected offenses allegedly committed by servicemen.

A mere glance at the reports of the United States Court of Military Appeals discloses the volume of prosecutions in military tribunals. Retrospective application of *O'Callahan* would not only affect the validity of many criminal convictions but would result in adjustments and controversy over back pay, veterans' benefits, retirement pay, pensions, and other matters. In addition, the task of establishing a service connection on the basis of a stale record or in a new trial would prove formidable if not impossible in many cases, since at the time the record was made the question whether there was a service connection was of no importance.

Gosa and Flemings press upon us a recent law review article. Blumenfeld, Retroactivity After O'Callahan: An Analytical and Statistical Approach, 60 Geo. L. J. 551 (1972). The author of that article concludes: (1) On the basis of a sampling of cases reviewed by the Court of Military Appeals and the Army Court of Military Review between June 2, 1969 (the date of *O'Callahan*), and December 31, 1970, only about 1% of the general court-martial cases were service connected. *Id.*, at 580 n. 147. (2) "[V]ery few" servicemen have sought collateral review of their convictions since *O'Callahan* was decided. *Id.*, at 578 n. 141. The author asserts, however: "Even if the number of requests for relief sent

to military departments should exceed expectations, the Defense Department, with an abundance of personnel and computers, could develop procedures to insure a quick review." *Id.*, at 572. (3) The military has necessary machinery to process claims and petitions for review. *Id.*, at 571–575. (4) The financial impact of a ruling of retroactivity would not be great since most servicemen convicted of nonservice-connected crimes would not be entitled to retirement or pension pay and, in any event, the average return should not exceed $1,500. *Id.*, at 574–575.

In *Mercer* v. *Dillon*, 19 U. S. C. M. A. 264, 41 C. M. R. 264 (1970), the United States Court of Military Appeals, a tribunal composed of civilian judges, 10 U. S. C. § 867, but uniquely familiar with the military system of justice, spoke in another vein.[7] A pertinent factor, too, is that

[7] "We recognize that not all the persons possibly entitled to review and relief would have the initiative or a sufficient financial interest to justify the time and expense of bringing suits or applications. A reliable estimate of the number of court-martial convictions that could be overturned by a retroactive application of *O'Callahan* is nearly impossible to secure. For the one fiscal year of 1968, the Army, the Navy, and the Air Force conducted approximately 74,000 special and general courts-martial. If only the smallest fraction of these courts-martial and those conducted in the other years since 1916 involved an *O'Callahan* issue, it is an understatement that thousands of courts-martial would still be subject to review. The range of relief could be extensive, involving such actions as determinations by the military departments of whether the character of discharges must be changed, and consideration of retroactive entitlement to pay, retired pay, pensions, compensation, and other veterans' benefits. Among the difficulties would be the necessity of reconstructing the pay grade that a member of the armed forces would have attained except for the sentence of the invalidated court-martial, a task complicated by the existence of a personnel system involving selection of only the best qualified eligibles and providing for the elimination of others after specified years of service." 19 U. S. C. M. A., at 267–268, 41 C. M. R., at 267–268.

until Flemings' case emerged in the Second Circuit, the civilian and the military courts had ruled against applying *O'Callahan* retroactively; thus there was no decisional impetus to encourage litigation.

We must necessarily also consider the impact of a retroactivity holding on the interests of society when the new constitutional standard promulgated does not bring into question the accuracy of prior adjudications of guilt. Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses, particularly military ones, no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared. Society must not be made to tolerate a result of that kind when there is no significant question concerning the accuracy of the process by which judgment was rendered or, in other words, when essential justice is not involved.

We conclude that the purpose to be served by *O'Callahan*, the reliance on the law as it stood before that decision, and the effect of a holding of retroactivity, all require that *O'Callahan* be accorded prospective application only. We so hold.[8]

IV

Flemings also urges that, because his court-martial proceeding was convened in Brooklyn, whereas the auto theft took place in New Jersey and his arrest in Pennsylvania, he was deprived of the right to a trial in the vicinage, as guaranteed by Art. III, § 2, cl. 3, of the

[8] In Flemings' case, the Secretary argues, in the alternative, that *O'Callahan* does not require the invalidation of the auto theft conviction because the offense was committed while the respondent was absent without leave during wartime. For that reason, it is said, the offense was service connected under the rationale of *Relford*. In view of our holding on the issue of retroactivity, we do not reach, and need not resolve, this alternative argument.

Constitution. This claim was not raised before the military court. Moreover, a military tribunal is an Article I legislative court with jurisdiction independent of the judicial power created and defined by Article III. *Ex parte Quirin*, 317 U. S. 1, 39 (1942); *Whelchel* v. *McDonald*, 340 U. S. 122, 127 (1950); *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 165 (1963). General court-martial jurisdiction is not restricted territorially to the limits of a particular State or district. 1 W. Winthrop, Military Law and Precedents 104–105 (2d ed. 1896). And the vicinage requirement has primary relevance to trial by jury. In any event, Flemings has demonstrated no prejudice.

The judgment in No. 71–6314 is affirmed; that in No. 71–1398 is reversed.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring in the result in part in No. 71–6314 and concurring in the result in No. 71–1398.

I agree with MR. JUSTICE STEWART that respondent Flemings committed a "service connected" crime.[1]

As to the *Gosa* case I think the case should be put down for reargument on whether *res judicata* controls the disposition of the case. The argument that it does goes as follows:

Petitioner Gosa was tried for rape before a military tribunal and convicted. The case went through the hierarchy of review within the military establishment and after the conviction and sentence were affirmed, a

[1] In the *Flemings* case respondent in time of war went AWOL and stole a car from a civilian. The military charge against him was an unauthorized absence from his duty station during wartime and theft of a car from a civilian. He pleaded guilty; and the only action brought came years later when he sought correction of his military records.

petition for review was filed with the Court of Military Appeals (a civilian court created by Congress); but that court denied review.[2] The events described took place in 1966 and 1967. On June 2, 1969, we decided *O'Callahan* v. *Parker,* 395 U. S. 258, invalidating the court-martial conviction for rape committed off the military base by a serviceman who was on leave.

O'Callahan in that respect is on all fours with the instant case, for here petitioner was officially off-duty, in civilian clothes, and was found to have raped a civilian in no way connected with the military, while he was in Cheyenne, Wyoming, near Warren Air Force Base but not on the base.

O'Callahan was decided in 1969 and in reliance on it petitioner Gosa started this habeas corpus action [3] seeking

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[2] The Uniform Code of Military Justice, after providing for investigation before a charge is referred to a general court-martial in Art. 32 (a), goes on to state in Art. 32 (b):

"The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. Upon his own request he shall be represented by civilian counsel if provided by him, or military counsel of his own selection if such counsel is reasonably available, or by counsel detailed by the officer exercising general court-martial jurisdiction over the command. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused." 10 U. S. C. § 832 (b).

Petitioner had counsel before the Court of Military Appeals, one designated by the Army; and only "the merits" of the conviction were raised, no question being raised relating to the "jurisdiction" of the military.

[3] Title 10 U. S. C. § 876 provides that military review of court-martial convictions shall be "final and conclusive" and "binding upon

release from his confinement under the military sentence.

The question whether one of our constitutional decisions should be retroactively applied has been before us on numerous occasions. *Linkletter* v. *Walker*, 381 U. S. 618; *Stovall* v. *Denno*, 388 U. S. 293, 297; *Desist* v. *United States*, 394 U. S. 244; *DeStefano* v. *Woods*, 392 U. S. 631.

But in all cases to date which involved retroactivity the question has been whether the court whose judgment is being reviewed should be required in the interests of substantial justice to retry the accused under the new constitutional rule announced by the Court after the first trial had been completed but before the new constitutional

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all . . . courts . . . of the United States." As we noted in *United States* v. *Augenblick*, 393 U. S. 348, 349–350, relief by way of habeas corpus is an exception to that finality clause.

It was suggested by the Solicitor General in his brief in opposition to a motion for leave to file a petition for writ of certiorari in *Crawford* v. *United States*, 380 U. S. 970, that while the statutes made the judgment of the Court of Military Appeals "final and conclusive," habeas corpus would be available to a person confined and a writ of error *coram nobis* in the District Court if he is not confined; citing 25 U. S. C. § 1254 (c) (probably intending 28 U. S. C. § 1254 (1)); *Hiatt* v. *Brown*, 339 U. S. 103, 106 n. 1. In that view one who was unsuccessful in obtaining relief by way of *coram nobis* in the district court, would be able to seek review in the court of appeals and ultimately by certiorari in this Court. That question was not resolved by this Court, since we denied certiorari in the *Crawford* case. In the *Crawford* case the question tendered on the merits was whether the restriction of court-martial membership to senior noncommissioned officers, excluding entire classes of statutorily eligible prospective court-martial members, deprived petitioner of due process and violated 10 U. S. C. § 825 so as to deprive the court-martial of jurisdiction. For the decision of the Court of Military Appeals see *United States* v. *Crawford*, 15 U. S. C. M. A. 31, 35 C. M. R. 3. And see Schiesser, Trial by Peers: Enlisted Members on Courts-Martial, 15 Cath. U. L. Rev. 171 (1966).

decision was announced. The measure applied as to whether the new rule should be prospective or retroactive[4] was the three-pronged test stated in *Stovall* v. *Denno, supra,* at 297: "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."

Here the question is whether a civilian, rather than a military, tribunal should have tried him. Does the question whether the "jurisdiction"[5] of the military tribunal can be contested at this late date turn on whether *res judicata* bars that inquiry?

Petitioner Gosa in the review of his conviction by the military tribunal never raised the question raised in *O'Callahan.*[6] If he was "constitutionally immune from punishment" in any court, we would have the problem presented in *United States* v. *U. S. Coin & Currency,* 401 U. S. 715, 723–724. But petitioner was not tried by a

[4] The Court of Military Appeals decided that *O'Callahan* v. *Parker* would be applied only to those convictions that were not final before the date of that decision. *Mercer* v. *Dillon,* 19 U. S. C. M. A. 264, 41 C. M. R. 264 (1970).

[5] For purposes of habeas corpus, historically used to test the "jurisdiction" of tribunals to try defendants, the concept has been broadened to include constitutional guarantees. Thus in *Johnson* v. *Zerbst,* 304 U. S. 458, compliance with the constitutional mandate that an accused is entitled to counsel was held to be "an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Id.,* at 467. The rule announced used "jurisdiction" in an innovative way with the purpose of giving counsel to defendants who up to the time of our decisions in *Gideon* v. *Wainwright,* 372 U. S. 335, and *Argersinger* v. *Hamlin,* 407 U. S. 25, had no lawyers to represent them and thus were commonly deprived of their constitutional rights.

[6] See n. 2, *supra.*

kangaroo court or by eager vigilantes but by military authorities within the framework established by Congress in the Uniform Code of Military Justice.

The case is somewhat unlike *McClaughry* v. *Deming*, 186 U. S. 49, where a court-martial was constituted of officers of the regular army who by an Act of Congress were not authorized to sit in judgment on volunteers. The court-martial was held incompetent to sit on the case because it acted in plain violation of an Act of Congress. There was therefore no tribunal authorized by law to render the challenged judgment. Consent to be so tried could not confer jurisdiction in face of the mandate of the statute. In the present cases Congress by express provisions of the Code had authorized the military tribunals to sit in these types of cases.

In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, municipal debts were readjusted by a federal district court under an Act of Congress which this Court later held to be unconstitutional. The latter ruling was in *Ashton* v. *Cameron County District*, 298 U. S. 513, where a closely divided Court held that an extension of the Bankruptcy Act to include a readjustment of the debts of municipalities and counties was unconstitutional. Petitioner had its debts readjusted under that Act, which permitted less than all of the outstanding bondholders to agree to a plan. That plan was consummated before the *Ashton* decision. Respondent was one of the nonconsenting bondholders. After the *Ashton* decision it brought suit on its bonds. The question before the Court in the *Chicot County Drainage District* case was the extent to which the *Ashton* case should be made retroactive. The Court, speaking through Mr. Chief Justice Hughes, said that the proceedings in the District Court "were conducted in complete conformity to the statute" and that "no question had been raised as to the regu-

larity of the court's action." 308 U. S., at 375. Since the parties had an opportunity to raise the question of invalidity but did not do so, they "were not the less bound by the decree because they failed to raise it." *Ibid.* Mr. Chief Justice Hughes added, *id.*, at 377:

> "Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination. If the contention is one as to validity, the question is to be considered in the light of the standing of the party who seeks to raise the question and of its particular application."

He went on to say, *id.*, at 378:

> "[*R*]*es judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' *Grubb* v. *Public Utilities Comm'n,* [281 U. S. 470, 479]."

Petitioner claims, as did respondent in the *Chicot County Drainage District* case, that the tribunal that first adjudicated the cause acted unconstitutionally. At the time the military court acted, however, it was assumed to have "jurisdiction" and its "jurisdiction" was in no way challenged in the review proceedings available to petitioner. Did the issue of "jurisdiction" for that case therefore become *res judicata?*

These are, in brief, the reasons why *res judicata* arguably should lead to an affirmance in the *Gosa* case. Contrary to intimations in the dissenting opinion I have reached no position on the merits and would reserve judgment until the issue was fully explored on reargument.

MR. JUSTICE REHNQUIST, concurring in the judgments.

I do not believe that decisions of this Court would support a holding that the rule announced in *O'Callahan* v. *Parker*, 395 U. S. 258 (1969), should not be applied retroactively to court-martial convictions entered before the decision in that case. In *O'Callahan*, the Court clearly held that courts-martial did not have jurisdiction to try servicemen for "non-service connected" crimes. For substantially the reasons stated by my Brother MARSHALL, I believe that *Robinson* v. *Neil*, 409 U. S. 505 (1973), and prior decisions mandate that *O'Callahan* be applied retroactively.

In No. 71–6314, since I believe that the *O'Callahan* rule could not in any event be given only prospective application, the question arises whether the analytical inquiry sanctioned by that decision should even be undertaken. *O'Callahan*, was, in my opinion, wrongly decided, and I would overrule it for the reasons set forth by Mr. Justice Harlan in his dissenting opinion. 395 U. S., at 274–284.

In No. 71–1398, even if *O'Callahan* were followed, I agree with the views of my Brother STEWART. The offense was committed during a period of declared war, and furthermore while respondent was absent without official leave from his military duties. For purposes of the "service connected"—"non-service connected" dichotomy announced by *O'Callahan*, I would hold that any crime committed by a member of the Armed Forces during time of war is "service connected," and that he can validly be tried by a court-martial for that offense. Cf. *Relford* v. *Commandant*, 401 U. S. 355 (1971).

I therefore concur in the judgments of the Court, and would affirm the judgment of the Court of Appeals in No. 71–6314 and reverse that in No. 71–1398.

MR. JUSTICE STEWART, dissenting in No. 71–6314, *Gosa* v. *Mayden*, and, joined by MR. JUSTICE DOUGLAS, concurring in the result in No. 71–1398, *Warner* v. *Flemings*.

I dissented in *O'Callahan* v. *Parker*, 395 U. S. 258, 274 (1969), and continue to believe that that case was wrongly decided. Until or unless *O'Callahan* is overruled, however, I think it must be given fully retroactive application for the reasons stated in my Brother MARSHALL's persuasive dissenting opinion, *post*, this page. Accordingly, I join his dissenting opinion as it applies to No. 71–6314, *Gosa* v. *Mayden*.

But that view, in my opinion, does not dispose of No. 71–1398, *Warner* v. *Flemings*. I think that a serviceman who deserts his post during a time of congressionally declared war and steals an automobile is guilty of a "service connected" offense. Accordingly, I conclude that the respondent Flemings was properly tried before a court-martial under *O'Callahan*. Cf. *Relford* v. *Commandant*, 401 U. S. 355, 365 (1971). For this reason I concur in the result reached by the Court in the *Flemings* case.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART* join, dissenting.

I

MR. JUSTICE BLACKMUN'S plurality opinion, by its efforts to establish that *O'Callahan* v. *Parker*, 395 U. S. 258 (1969), was not a decision dealing with jurisdiction in its classic form, implicitly acknowledges that if *O'Callahan* were in fact concerned with the adjudicatory

*MR. JUSTICE STEWART joins this opinion only as it applies to No. 71–6314. See *ante*, this page.

power—that is, the jurisdictional competency [1]—of military tribunals, its holding would necessarily be fully retroactive in effect, cf. *e. g., Linkletter* v. *Walker,* 381 U. S. 618, 623 (1965). The plurality now puts forth the view that *O'Callahan* was not concerned with the true jurisdictional competency of courts-martial but that the decision yielded merely a new constitutional rule. This characterization of *O'Callahan* permits the plurality to apply in this case the three-prong test employed to judge the retroactivity of new procedural rules under *Linkletter* and its progeny, see, *e. g., Desist* v. *United States,* 394 U. S. 244, 249 (1969); *Stovall* v. *Denno,* 388 U. S. 293, 297 (1967). And, not surprisingly, application of that test leads to the conclusion that *O'Callahan* should have only prospective effect. With all due respect, I must dissent.

I am unable to agree with the plurality's characterization of *O'Callahan.* In my view, it can only be understood as a decision dealing with the constitutional limits of the military's adjudicatory power over offenses committed by servicemen. No decision could more plainly involve the limits of a tribunal's power to exercise jurisdiction over particular offenses and thus more clearly demand retroactive application.

A

In holding that *O'Callahan* is to be given only prospective effect, the plurality does not reject outright the view that the decision was jurisdictional in nature. Yet it clearly does reject the contention that *O'Callahan* dealt with a question of true jurisdictional competency, for we are told that the decision "did announce a new constitutional principle," *ante,* at 673, and that it really "dealt with the appropriate exercise of jurisdiction

[1] See generally Restatement of Judgments § 7, comments at 41–46 (1942).

by military tribunals," *ante,* at 674. The difference between a decision concerning a tribunal's jurisdictional competency—that is, the limits of its adjudicatory power—and "the appropriate exercise of [its] jurisdiction" is less than clear to me, at least where, as here, the question of "appropriateness" ultimately turns on the extent of Congress' constitutional authority under Art. I, § 8, cl. 14, to "make Rules for the Government and Regulation of the land and naval Forces." But whatever the nature of the distinction that the plurality now seeks to draw, it cannot, in my opinion, obscure the essential character of the decision in *O'Callahan.*

O'Callahan required this Court to define the class of offenses committed by servicemen that Congress, under Art. I, § 8, cl. 14, could constitutionally empower military tribunals to try. The nature of the ultimate inquiry there is plain from the question upon which the Court granted certiorari: " 'Does a court-martial, held under the Articles of War, Tit. 10, U. S. C. § 801 *et seq.,* have jurisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by grand jury and trial by a petit jury in a civilian court?' " 395 U. S., at 261. The *O'Callahan* Court's discussion of this issue was consistently couched in terms of the jurisdiction of military tribunals;[2] and, in dissent, Mr. Justice Harlan, too, framed the issue presented in the unmistakable terms of "the appropriate subject-matter jurisdiction of courts-martial," *id.,* at 276. Even the Court of Appeals in No. 71–6314, while ultimately holding the *O'Callahan* decision to be prospective only, acknowledged that the decision turned upon a determination of "lack of adjudicatory power"—that *"O'Cal-*

[2] See 395 U. S., at 265, 267, 269, 272.

lahan's foundation, framework and structure deny to the legislation which breathed the breath of judicial life into the forum that tried Sgt. O'Callahan, the necessary basis in constitutional power to reach his type of case." [3] 450 F. 2d 753, 757 (CA5 1971). See also *United States ex rel. Flemings* v. *Chafee*, 458 F. 2d 544, 549–550 (CA2 1972).

Despite the evident jurisdictional nature of the ultimate issue presented in *O'Callahan*, the plurality attempts to analogize this case to *DeStefano* v. *Woods*, 392 U. S. 631 (1968), where the Court held that the decisions in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and *Bloom* v. *Illinois*, 391 U. S. 194 (1968), were to have only prospective effect. *Duncan* held that the Sixth Amendment guarantee of trial by jury in criminal cases had been made applicable to the States by the Fourteenth Amendment. And *Bloom* established the right to jury trial in the context of serious criminal contempt proceedings. *DeStefano*—like the other offspring of *Linkletter* that have applied the three-prong test to determine retroactivity—involved constitutional rulings that established new procedures for the conduct of trial or for the use of evidence. But *O'Callahan* hardly was such a case.

The Court in *O'Callahan* was not setting forth procedures which the military was constitutionally required to adopt in its proceedings. Had the Court been doing so, this would certainly be a different case; the analogy

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[3] In *Relford* v. *Commandant*, 401 U. S. 355, 356 (1971), MR. JUSTICE BLACKMUN, speaking for the Court, described the *O'Callahan* decision as follows:

"In *O'Callahan* . . . , by a five-to-three vote, the Court held that a court-martial may not try a member of our armed forces charged with attempted rape of a civilian, with housebreaking, and with assault with intent to rape, when the alleged offenses were committed off-post on American territory, when the soldier was on leave, and when the charges could have been prosecuted in a civilian court."

to *DeStefano* then might well be appropriate. It is true, as the plurality now points out, that the *O'Callahan* Court placed considerable emphasis on the lack of jury trial in the court-martial system. But it did so only as a part of the general analytic process of determining the proper reconciliation of the competing jurisdictions of two essentially distinct[4] judicial systems, namely, the civil and military systems of justice. The Court's basic concern in this process was the preservation—to the fullest extent possible consistent with the legitimate needs of the military—of the fundamental civil rights guaranteed by our Constitution and Bill of Rights. Those civil rights were, in the Court's words, the "constitutional stakes in the . . . litigation." *O'Callahan* v. *Parker, supra,* at 262.

Thus, the Court pointed out that one tried before a military tribunal is without the benefit of not only trial by jury but also indictment by a grand jury. *Ibid.* Nor are the same rules of evidence and procedure applicable in a military proceeding, a factor affecting, for example, the defense's access to compulsory process, *id.,* at 264 n. 4. In addition, the Court was concerned with the fact that the presiding officers at courts-martial do not enjoy the independence that is thought to flow from life tenure and undiminishable salary. To the contrary, the Court recognized that "the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger." *Id.,* at 264. In short, the Court con-

[4] A serviceman convicted by a court-martial does, of course, ultimately have access to the federal judicial system by way of a petition for federal habeas corpus. See, *e. g., Burns* v. *Wilson,* 346 U. S. 137 (1953); *Gusik* v. *Schilder,* 340 U. S. 128 (1950).

cluded that "[a] court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved," *Id.*, at 265.

The Court's purpose in considering these factors was not to require changes in the military system of justice, but rather to illustrate its "fundamental differences from . . . the civilian courts," *id.*, at 262, differences that compelled the Court " 'to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service,' " *id.*, at 265, quoting from *Toth* v. *Quarles*, 350 U. S. 11, 22 (1955). As a result, the Court concluded that the "crime to be under military jurisdiction must be service connected . . . ," 395 U. S., at 272, so that the power of Congress under Art. I, § 8, cl. 14, to "make Rules for the Government and Regulation of the land and naval Forces," and also the exemption from the grand jury requirement of the Fifth Amendment for "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" are not expanded to deprive servicemen unjustifiably of their civil rights.[5] The Court found that when an offense is not service

[5] Indeed, even if the military voluntarily elected to provide servicemen on trial before courts-martial with the full panoply of procedural rights constitutionally required in civil forums, that would not affect the decision in *O'Callahan*. Implicit in *O'Callahan* is the fact that the military system of justice has never been understood to be constitutionally compelled to provide many of the procedural rights afforded by the civilian courts, and thus it would always remain free to provide only that which is constitutionally necessary. It was with an understanding of what is constitutionally required, not of what the military might elect to provide, that the scope of Congress' power under Art. I, § 8, cl. 14, had to be, and was, defined in *O'Callahan*, see 395 U. S., at 261–262. It is this fact that perhaps best demonstrates the true jurisdictional—as opposed to procedural—nature of that decision.

connected, the needs of the military are not significantly implicated and thus that the limits of Congress' constitutional power over servicemen under Art. I, § 8, cl. 14, have been passed, at least in the context of "peacetime offenses," 395 U. S., at 273.

Certainly the jurisdictional nature of the *O'Callahan* decision is amply demonstrated by this Court's previous decision in *McClaughry* v. *Deming*, 186 U. S. 49 (1902). There the Court was called upon to decide "the power of an officer convening a court-martial for the trial of an officer of volunteers [reserve troops], to compose that court entirely of officers of the Regular Army." *Id.*, at 53. The Court determined that Congress had directed by statute that volunteer officers of the Army be tried only by a court-martial composed of volunteer officers. In light of this determination the Court concluded:

> "As to the officer to be tried there was no court, for it seems to us that it cannot be contended that men, not one of whom is authorized by law to sit, but on the contrary all of whom are forbidden to sit, can constitute a legal court-martial because detailed to act as such court by an officer who in making such detail acted contrary to and in complete violation of law. Where does such a court obtain jurisdiction to perform a single official function? How does it get jurisdiction over any subject-matter or over the person of any individual? The particular tribunal is a mere creature of the statute, as we have said, and must be created under its provisions." *Id.*, at 64.

In the same vein, the Court elsewhere stated: "A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction." *Id.*, at 62. Because of the flaw

in the composition of the court-martial, a flaw which the Court considered determinative on the issue of the court-martial's jurisdiction, the Court affirmed a lower court's issuance of a writ of habeas corpus to secure the officer's release from military custody. Significantly, this writ was issued at a time when habeas corpus clearly lay only where the court-martial had "no jurisdiction over the person of the defendant or the subject-matter of the charges against him." *Id.*, at 69.[6] In *O'Callahan* the Court was not concerned with the composition of a particular court-martial, but with the fundamental question of the extent of Congress' constitutional power to establish court-martial jurisdiction over offenses committed by our servicemen. If the former issue goes to the jurisdiction of military tribunals, certainly the latter does.

B

With this understanding of *O'Callahan*, I believe, contrary to the plurality's view, that the retroactive application of our holding there is required by our prior decisions in *Robinson* v. *Neil*, 409 U. S. 505 (1973), and *United States* v. *U. S. Coin & Currency*, 401 U. S. 715, 722–724 (1971). *Robinson* involved the retroactive application of the decision in *Waller* v. *Florida*, 397 U. S. 387 (1970), that the Fifth Amendment's guarantee, made applicable to the States through the Fourteenth Amendment, that no person should be put twice in jeopardy for the same offense barred an individual's prosecution for a single offense by both a State and a municipality of the State, that is, a legal subdivision of the State. *U. S. Coin & Currency* held retro-

[6] See also Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1209 (1970). The Court moved beyond the jurisdictional limitation on collateral attacks upon court-martial convictions in *Burns* v. *Wilson*, 346 U. S. 137 (1953). See Developments in the Law—Federal Habeas Corpus, *supra*, at 1215–1216.

active the Court's prior determination that the Fifth Amendment privilege against compulsory self-incrimination barred the prosecution of gamblers for failure to register and to report illegal gambling proceeds for tax purposes, see *Marchetti* v. *United States*, 390 U. S. 39 (1968); *Grosso* v. *United States*, 390 U. S. 62 (1968).

In deciding whether to give retroactive effect to *Waller*, *Marchetti*, and *Grosso*, the Court rejected contentions that it should apply the three-prong test employed in cases such as *Stovall* v. *Denno*, 388 U. S. 293 (1967), *Desist* v. *United States*, 394 U. S. 244 (1969), and *DeStefano* v. *Woods*, 392 U. S. 631 (1968). In *U. S. Coin & Currency*, Mr. Justice Harlan, speaking for the Court, explained:

> "Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the factfinding process at trial. *Linkletter* v. *Walker*, 381 U. S. 618 (1965); *Tehan* v. *Shott*, 382 U. S. 406 (1966); *Johnson* v. *New Jersey*, 384 U. S. 719 (1966); *Stovall* v. *Denno*, 388 U. S. 293 (1967). Rather, *Marchetti* and *Grosso* dealt with the kind of conduct that cannot constitutionally be punished in the first instance." 401 U. S., at 723.

The *Robinson* Court adopted essentially the same view of the *Waller* decision concerning the Double Jeopardy Clause and multiple prosecutions by different legal subdivisions of a single sovereign. See 409 U. S., at 508. In this case, too, we are concerned, not with "the implementation of a procedural rule," but with an unavoidable constitutional impediment to the prosecution of particular conduct.

In *O'Callahan*, as has been seen, the ultimate issue was the extent of the constitutional power that underlies

the jurisdiction of military tribunals. Where an offense lies outside the limits of that power, there exists just as much of a constitutional impediment to trial by court-martial as there existed to a civilian trial in *Marchetti* and *Grosso* due to the privilege against self-incrimination or in *Waller* due to the Double Jeopardy Clause. It cannot be forgotten that military tribunals are courts of limited jurisdiction. See *McClaughry* v. *Deming*, 186 U. S., at 63; *Ex parte Watkins*, 3 Pet. 193, 209 (1830). They cannot exercise authority which Congress has not conferred upon them, much less authority which Congress is without constitutional power to confer.[7] It is this fundamental principle that compels retroactive application of the decision in *O'Callahan*.

The plurality seeks to distinguish *U. S. Coin & Currency* and *Robinson* on the grounds that the former involved a right that prevented the offender from being tried at all and the latter a right that prevented "another trial from taking place at all," *ante*, at 679, whereas the underlying issue in this case is merely which jurisdiction can try offenses committed by servicemen. But these are distinctions without meaning; they

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[7] Cf. Restatement of Judgments § 7, comment *b*, pp. 42–43 (1942): "There are many situations in which a court lacks competency to render a judgment. Thus, although a State has jurisdiction to grant a divorce of parties domiciled within the State, a decree of divorce rendered by a court which is not empowered to entertain suits for divorce is void. Similarly, a judgment rendered by a justice of the peace is void if under the law of the State such justices are not empowered to deal with the subject matter of the action; as, for example, where the action is one for tort and justices of the peace are given no power except in actions of contract. So also, where a court is given power to deal with actions involving no more than a designated amount, the statute limiting the amount is ordinarily construed not merely to make erroneous a judgment rendered by such a court in excess of its power, but to make such judgment void."

merely reflect the differences in the nature of the constitutional impediment to trial at issue in each case. The essential common thread tying these cases together is that each involved, at the least, a constitutional barrier to trial before the particular forum, regardless of the fairness of the procedures and the factfinding process of the relevant forum.

U. S. Coin & Currency swept broadly, to be sure, for it concerned a constitutional guarantee that effectively prevented any trial of the offender for the particular offense. But the nature of the Double Jeopardy Clause at issue in *Robinson* is such that the offender may be tried once for a particular offense by a court of a particular sovereign; it is the second prosecution for the same offense by another court of the same sovereign that that Clause clearly bars. Similarly here, a serviceman charged with a nonservice-connected offense is subject to trial for that offense by civil tribunals, but military tribunals lack the necessary constitutional power, at least in peacetime, to try such an offense. As was true in *Robinson,* this case involves a constitutional barrier to adjudication of a particular offense by a particular forum, yet in neither case does it follow that the offender is constitutionally entitled to go unpunished altogether. I fail to see, therefore, why different rules from those applied only recently in *Robinson* should be applied in this case.

There is, of course, the additional fact that the *Robinson* Court left open the question whether reasonable, official reliance upon a particular rule might properly be considered "in determining retroactivity of a nonprocedural constitutional decision such as *Waller.*" 409 U. S., at 511.[8] And in this case the plurality, in attempt-

[8] In *Robinson* itself, the Court concluded that, in all events, there was no substantial element of reliance since "*Waller* cannot be said to have marked a departure from past decisions of this Court." 409 U. S., at 510.

ing to establish that *O'Callahan* was a " 'clear break with the past,' " *ante*, at 672, citing *Desist* v. *United States*, 394 U. S., at 248, and should therefore be applied only prospectively, does make much of the argument that substantial, justifiable reliance was placed on pre-*O'Callahan* law concerning the exercise of court-martial jurisdiction over servicemen, see *ante*, at 672–673. But I seriously question the relevance of any inquiry into official reliance on prior law where, as here, the issue is jurisdictional competency. Even assuming for the moment that *O'Callahan* completely reinterpreted the limits of Congress' power to confer jurisdiction on courts-martial, the decision involved the authoritative construction of a constitutional provision and no military tribunal could ever constitutionally have had more power than resided therein. But the real point is that *O'Callahan* did not mark a sharp, new departure from prior law.

The plurality acknowledges that *O'Callahan* did not involve the overruling of any prior precedent, *ante*, at 673. It is true, as the plurality indicates, that a number of prior decisions had suggested that "military status in itself was sufficient for the exercise of court-martial jurisdiction," *ibid.* Yet none of the cases upon which the plurality relies dealt in fact with a nonservice-connected offense committed by a serviceman in peacetime.[9] It is fair to say, in short, that until *O'Callahan*

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[9] *Kinsella* v. *Singleton*, 361 U. S. 234 (1960), *Reid* v. *Covert*, 354 U. S. 1 (1957), and *Ex parte Milligan*, 4 Wall. 2 (1866), dealt with the exercise of military jurisdiction to try civilians, not servicemen. In each case, the Court held that the military lacked jurisdiction to try the civilians.

In *Grafton* v. *United States*, 206 U. S. 333 (1907), the Court held that a soldier who had been acquitted by a properly convened court-martial of a charge of homicide growing out of the shooting of a civilian while he was on guard duty in the Phillipine Islands could not thereafter be tried and convicted for the same offense by a civilian court of that Territory. *Johnson* v. *Sayre*, 158 U. S. 109

the Court had not directly faced the issue of the service-connected nature of servicemen's offenses.

More importantly, perhaps, the *O'Callahan* Court's efforts to define the constitutional limits of the jurisdiction of courts-martial was hardly the beginning of such efforts by the Court. *O'Callahan* was but one of a series of steps taken by this Court since the conclusion of the Second World War to restrict military jurisdiction to its constitutionally appropriate limits. Thus, in *Toth* v. *Quarles,* 350 U. S. 11 (1955), the Court ruled that a discharged serviceman could not be tried by a court-martial for offenses committed while a member of the Armed Forces. Subsequently, it was established that courts-martial did not have jurisdiction to try offenses committed by civilian dependents accompanying military personnel

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(1895), involved the court-martial conviction of a navy paymaster, whom the Court found to be in the naval service of the United States, for embezzling naval funds while serving on a receiving ship of the United States Navy. And in *Smith* v. *Whitney,* 116 U. S. 167 (1886), the Court was asked to order that a writ of prohibition be issued against a court-martial convened to try a naval pay inspector essentially for making various contracts not in the best interest of the Navy, for failing properly to enforce contractual agreements with the Navy, for compelling payment of illegal contractual claims against the Navy, and for failing to perform his duties and responsibilities. There can be little question that each of the offenses in *Grafton, Johnson,* and *Smith,* was "service connected" within the meaning of *O'Callahan.* Contrast *Relford* v. *Commandant,* 401 U. S., at 365.

Finally, *Coleman* v. *Tennessee,* 97 U. S. 509 (1879), involved the court-martial conviction of a soldier for the murder of a civilian woman. The particular circumstances of the murder are not apparent from the Court's opinion, but it is clear that the crime occurred during the Civil War, that is, during wartime, rather than during peacetime, see *id.,* at 516–517. *O'Callahan* did not clearly speak with respect to constitutional limits of court-martial jurisdiction during wartime since the offense at issue there had occurred in peacetime, and the plurality does not reach the issue of wartime offenses today, although it arguably is presented in No. 71–1398, see *ante,* at 685 n. 8.

serving overseas. *Kinsella* v. *Singleton*, 361 U. S. 234 (1960); *Reid* v. *Covert*, 354 U. S. 1 (1957). Finally, the Court held that civilians employed with the military overseas were not subject to court-martial jurisdiction. See *Grisham* v. *Hagan*, 361 U. S. 278 (1960); *McElroy* v. *Guagliardo*, 361 U. S. 281 (1960). This series of cases limited the reach of courts-martial to members of the Armed Forces; they did not require the Court to go on to define the breadth of offenses for which servicemen could be tried by courts-martial. Nonetheless, these cases and *O'Callahan* clearly were all pieces of the same cloth. Under these circumstances, I seriously doubt that retroactive application would do substantial violence to any legitimate, official reliance upon prior law [10]—even assuming that to be a valid consideration here.[11]

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[10] With regard to the question of official reliance, it has been pointed out that as long ago as 1955 the Departments of Justice and Defense reached an agreement that at least federal offenses committed by servicemen off-post would fall within the jurisdiction of the Justice Department while those committed on-post would be within the jurisdiction of the Defense Department:

"The Departments of Justice and Defense have found it desirable to establish ground rules for determining the forum for trying a serviceman charged with a civil offense in violation of both military and federal law. In general, these rules, which were established by agreement between the Departments in 1955, give to the military department concerned the responsibility of investigating and prosecuting offenses committed by persons subject to the Uniform Code of Military Justice and involving as victims only those persons or their civilian dependents residing on the military installation in question." Duke & Vogel, The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction, 13 Vand. L. Rev. 435, 455 (1960), citing Army Reg. 22–160, Oct. 7, 1955, implementing Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Prosecution of Crimes Over Which the Two Departments have Concurrent Jurisdiction (July 19, 1955).

[11] Since the plurality opinion does not find it necessary to reach the Secretary's additional argument in No. 71–1398 that the auto

II

MR. JUSTICE DOUGLAS, in his concurring opinion, contends that petitioner Gosa's case merits reargument to consider whether he should be denied relief because he failed to raise his jurisdictional objection before the court-martial that tried him. MR. JUSTICE DOUGLAS intimates that since the jurisdiction of the military to try petitioner was not initially contested, "*res judicata* [may now bar] inquiry" into the question of jurisdiction, *ante,* at 689. In my opinion, such an argument is clearly untenable, and hence reargument of petitioner Gosa's case is unnecessary.

A

One of the most basic principles of our jurisprudence is that subject-matter jurisdiction cannot be conferred upon a court by consent of the parties. See, *e. g., American Fire & Casualty Co.* v. *Finn,* 341 U. S. 6, 17–18 (1951); *Industrial Addition Assn.* v. *Commissioner,* 323 U. S. 310, 313 (1945); *People's Bank* v. *Calhoun,* 102 U. S. 256, 260–261 (1880); *Cutler* v. *Rae,* 7 How. 729, 731 (1849).[12] An objection to the adjudicatory power of a tribunal may generally be raised for the first time at any stage of the litigation.[13] See, *e. g., Flast* v. *Cohen,* 392 U. S. 83, 88 n. 2 (1968); *United States* v. *Griffin,* 303 U. S. 226, 229 (1938); *Fortier* v. *New Orleans National Bank,* 112 U. S. 439, 444 (1884). Those principles are applicable even in the context of collateral attacks upon

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theft there at issue was service connected because the offense took place while respondent was absent without leave during wartime, I think it inappropriate for me to express any view on that additional argument at this time.

[12] See also Restatement of Judgments § 7, comment *d,* p. 45 (1942).

[13] Contrast n. 15, *infra.*

court-martial proceedings, as is evident from this Court's decision in *McClaughry* v. *Deming*, 186 U. S. 49 (1902).

McClaughry, as previously indicated, involved a collateral attack upon the court-martial conviction of a volunteer officer who claimed that the Regular Army court-martial which had tried him had been constituted in violation of the relevant law and therefore was without jurisdiction. The volunteer officer had failed to raise this jurisdictional objection before the court-martial, and the military contended before this Court that "his consent waived the question of invalidity," *id.*, at 66. The Court rejected his contention, saying:

> "It was not a mere consent to waive some statutory provision in his favor which, if waived, permitted the court to proceed. His consent could no more give jurisdiction to the court, either over the subject-matter or over his person, than if it had been composed of a like number of civilians . . . . The fundamental difficulty lies in the fact that the court was constituted in direct violation of the statute, and no consent could confer jurisdiction over the person of the defendant or over the subject-matter of the accusation, because to take such jurisdiction would constitute a plain violation of law." *Ibid.*

See also *id.*, at 68; *Givens* v. *Zerbst*, 255 U. S. 11, 20 (1921); *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876, 879–880 (CA8 1929). Just as the silence of the accused in *McClaughry* could not confer jurisdiction on a court-martial of the Regular Army that was acting in excess of its statutory authority, so here the failure of Gosa to raise his jurisdictional objection before the court-martial could not have conferred upon that tribunal authority that constitutionally could not be conferred. Consequently, his

failure to object to the jurisdiction of the court-martial that tried him cannot be deemed fatal in this Court.[14]

B

Moreover, even if *O'Callahan* were to be treated as merely a procedural rather than as a true jurisdictional decision, application of the doctrine of *res judicata* would nonetheless be entirely inappropriate in the context of petitioner Gosa's case since that action was brought by way of a petition for federal habeas corpus. Specifically, I must vigorously disagree with the suggestion, necessarily inherent in MR. JUSTICE DOUGLAS' opinion, that the doctrine of *res judicata* may have some place in the law of federal habeas corpus. In the past, this Court has indicated quite explicitly to the contrary:

> "At common law the doctrine of *res judicata* did not extend to a decision on *habeas corpus* refusing to discharge the prisoner. The state courts generally have accepted that rule where not modified by statute . . . ; and this Court has conformed to it and thereby sanctioned it . . . . We regard the rule as well established in this jurisdiction." *Salinger* v. *Loisel*, 265 U. S. 224, 230 (1924).

See *Fay* v. *Noia*, 372 U. S. 391, 423 (1963); *Darr* v. *Burford*, 339 U. S. 200, 214 (1950). Indeed, the rule was still

[14] MR. JUSTICE DOUGLAS would seem inclined to limit unwaivable jurisdictional flaws to instances in which an accused is "tried by a kangaroo court or by eager vigilantes . . . ," *ante*, at 689–690. But the presence or absence of adjudicatory power does not turn only on the fairness of the proceeding afforded by a particular forum; rather, as *McClaughry* adequately illustrates, jurisdictional competency in the context of courts of limited jurisdiction such as courts-martial necessarily involves the limits of the statutory and constitutional authority that provides the legal underpinnings for such tribunals. See also *Hiatt* v. *Brown*, 339 U. S. 103, 111 (1950); and n. 7, *supra*.

"well established in this jurisdiction" just a few months ago.[15] See *Neil* v. *Biggers*, 409 U. S. 188, 190–191 (1972). The federal courts, to be sure, are not without means for

[15] For this reason, I believe that MR. JUSTICE DOUGLAS' reliance on *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940), is clearly misplaced insofar as petitioner Gosa's case is concerned. *Chicot County* involved a question concerning the extent of indebtedness on certain municipal bonds which had previously been the subject of a federal proceeding to readjust indebtedness under the bankruptcy laws. Following the readjustment proceeding, this Court declared unconstitutional the statute under which the proceeding had been brought, see *Ashton* v. *Cameron County District*, 298 U. S. 513 (1936). In *Chicot County*, this Court then held that the original decree was not open to collateral attack as void by the nonconsenting bondholders who had had notice of the original readjustment proceeding but had there lodged no objection to the court's jurisdiction.

The decision can be seen as resting simply on the doctrine of *res judicata* to which the Court referred at points in its opinion, see *Chicot County*, *supra*, at 374–375. The plaintiffs in the second action had had a full and fair opportunity to litigate the issue of jurisdiction in the first proceeding, but had failed to do so. At the same time, there had been substantial action taken in reliance on the readjustment plan approved in the first proceeding. New bonds had been sold to the Reconstruction Finance Corporation which had then purchased old bonds in exchange for them. Under these circumstances it was both fair and proper to bar litigation of the jurisdiction issue in the collateral proceeding. Cf. Restatement of Judgments § 10 and comment (1942).

But, as has been pointed out, the doctrine of *res judicata* has no place in federal habeas corpus; rigid rules restricting what questions are open to litigation on collateral attack are inappropriate in the context of judgments affecting personal liberty. There are, of course, legitimate concerns with finality in criminal proceedings—both civilian and military—and with the orderly functioning of independent judicial systems. But we have rules concerning exhaustion, waiver, and nonrepetitious application to protect those concerns in the context of federal habeas corpus.

More generally, *Chicot County* is probably most appropriately interpreted as an early decision concerning the nonretroactive application of a particular decision, namely, *Ashton*. Despite the Court's

dealing with repetitious applications for habeas corpus, see, *e. g., Salinger* v. *Loisel, supra,* at 231–232; 28 U. S. C. §§ 2244 (a), (b), or with applications raising questions previously litigated in this Court, see 28 U. S. C. § 2244 (c). But no such problems are presented here. Rather, a procedural problem arises in this case because petitioner Gosa failed to assert the "jurisdictional" defect, which he now raises, in seeking leave for a direct appeal to the Court of Military Appeals. This reflects, in my view, a failure on the part of Gosa to satisfy the exhaustion requirement, which is applied in the context of collateral attack on federal habeas corpus, thereby raising a substantial question whether he has waived his right to challenge the "jurisdiction" of the court-martial on habeas corpus.

The exhaustion doctrine evolved in the context of collateral attack on state criminal proceedings. See, *e. g., Ex parte Hawk,* 321 U. S. 114 (1944); *Ex parte Royall,* 117 U. S. 241 (1886). It generally requires state petitioners to utilize available state court remedies be-

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resort at places to the rubric of *res judicata,* the presence of substantial reliance on pre-existing law clearly was an important consideration in the Court's decision not to allow the intervening decision in *Ashton* to be used to collaterally attack the original plan of readjustment. Furthermore, *Chicot County* was heavily relied upon by this Court when it gave the principles governing the retroactivity of new procedural constitutional rules full expression in *Linkletter* v. *Walker,* 381 U. S. 618, 625–626 (1965); and the case has been cited as a retroactivity decision on a number of occasions since *Linkletter,* see *Chevron Oil Co.* v. *Huson,* 404 U. S. 97, 106 (1971); *United States* v. *U. S. Coin & Currency,* 401 U. S. 715, 742–743 (1971) (WHITE, J., dissenting); cf. *United States* v. *Estate of Donnelly,* 397 U. S. 286, 293–294 (1970); *id.,* at 299–300 (DOUGLAS, J., dissenting). Viewed then as a precursor of the present-day retroactivity doctrine, *Chicot County* has no relevance for the threshold question whether Gosa is barred from raising his jurisdictional challenge on habeas corpus because he failed to present it in applying for leave to appeal to the Court of Military Appeals.

fore resorting to federal habeas corpus,[16] and thus serves both to ensure the orderly functioning of state judicial processes, without disruptive federal court intervention, and to allow state courts to fulfill their roles as co-equal partners with the federal courts in the enforcement of federal law, thus often eliminating the need for federal court action, and avoiding unnecessary friction between state and federal courts. These same considerations inhere in the context of collateral attack in federal court upon the judgments of military tribunals, which constitute a judicial system—a system with its own peculiar purposes and legal traditions—distinct from the federal judicial system much like the independent state judicial systems. Accordingly, this Court normally has required that military petitioners exhaust all available remedies within the military justice system. See *Noyd* v. *Bond*, 395 U. S. 683, 693 (1969); *Gusik* v. *Schilder*, 340 U. S. 128, 131–132 (1950).[17] At the time petitioner Gosa initiated this collateral attack he indeed had not exhausted a military remedy which was formerly available to him

[16] This rule does not, however, entitle the state courts to more than one opportunity to consider the same claim. Thus, in *Brown* v. *Allen*, 344 U. S. 443, 447 (1953), where the petitioners had presented their federal claims to the state courts on direct review, the Court said, "It is not necessary in such circumstances for the prisoner to ask the state for collateral relief, based on the same evidence and issues already decided by direct review . . . ." Indeed, if the exhaustion requirement were not restricted to providing all levels of the state courts with an opportunity to hear his federal claim, it would effectively bar state prisoners from ever reaching a federal forum in States in which an unlimited number of identical applications for state post-conviction relief are permitted. The exhaustion requirement does not demand such "repetitious applications to state courts." *Id.*, at 448–449, n. 3.

[17] But see *McElroy* v. *Guagliardo*, 361 U. S. 281 (1960); *Reid* v. *Covert*, 354 U. S. 1 (1957); *Toth* v. *Quarles*, 350 U. S. 11 (1955); *Noyd* v. *Bond*, 395 U. S. 683, 696 n. 8 (1969).

with respect to the claim he now asserts. But that certainly ought not to be the end of the inquiry.

In *Fay* v. *Noia,* 372 U. S. 391 (1963), the Court rejected the position that a state prisoner who had not pursued his state appellate remedies was barred from seeking federal habeas corpus because of his failure to exhaust, where the state appellate remedies were no longer available. The Court concluded, instead, that the exhaustion "requirement refers only to a failure to exhaust state remedies still open to the applicant at the time he files his application for habeas corpus in the federal court." *Id.,* at 399. The Court established that where there has been a failure to resort to a state court remedy and that remedy is no longer available, the availability of federal habeas corpus would turn on whether there was a deliberate bypass of the state process. *Id.,* at 438. In determining whether such a bypass has occurred, the Court said that "[t]he classic definition of waiver enunciated in *Johnson* v. *Zerbst,* 304 U. S. 458, 464—'an intentional relinquishment or abandonment of a known right or privilege'—furnishes the controlling standard." 372 U. S., at 439.

This Court has never considered the applicability of the nondeliberate-bypass rule in the context of military petitioners. *Fay* does not speak specifically with respect to such petitioners. Nonetheless, the considerations which argue in favor of tempering the exhaustion requirement with a rule of nondeliberate bypass in the context of state petitioners are equally applicable in the context of military petitioners. Certainly, military petitioners should be encouraged to raise their constitutional claims before available military tribunals in order to ensure the orderly functioning of the system of military justice, to avoid needless federal court action, and to allow military tribunals an initial opportunity to correct

their own errors. These interests are not subverted, however, by allowing a military petitioner to seek federal habeas corpus on the basis of a claim which he failed to raise before the military courts because he either was unaware of or did not otherwise willingly fail to raise that claim. As with state petitioners, the integrity of the exhaustion requirement is adequately protected by a rule prohibiting a deliberate bypass of an available military tribunal. A more stringent rule would serve only to bar presentation of valid federal claims without any countervailing justification for doing so.

On the facts of this case, I find it impossible to conclude that petitioner Gosa has waived his right to challenge the "jurisdiction" of the court-martial which convicted him of rape on the ground that the offense was not service connected. A valid waiver requires the "intentional relinquishment . . . of a known right." [18] At

[18] Nothing in this Court's recent decisions in *Tollett* v. *Henderson*, 411 U. S. 258 (1973), and *Davis* v. *United States*, 411 U. S. 233 (1973), suggests that a different standard should be applied in the context of this case. *Tollett* involved a collateral attack upon the validity of a guilty plea in light of racial discrimination in the composition of the state grand jury that had indicted Henderson, an objection that had not been raised at the time of the entrance of the plea. Because it was clear that neither Henderson nor his counsel was aware of the claim of discrimination at the time of the plea, the Court agreed that there had been no valid waiver of the claim in traditional terms, see 411 U. S., at 266, but the Court did not consider that determination dispositive in the peculiar context of a collateral attack upon a guilty plea. Rather, the Court ruled that "[t]he focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity," *ibid.* We, of course, do not deal here with the special problem of a collateral attack upon a guilty plea.

In *Davis*, the Court held that, for purposes of collateral attack, a petitioner had waived his objection to the composition of the grand jury that tried him because he had failed to raise the objection

the time of petitioner's 1967 application for review by the Court of Military Appeals the substantial "jurisdictional" issue that he now raises had yet to be addressed by this Court. While *O'Callahan* is, to be sure, properly viewed as one further step in the ongoing process of establishing the limits of court-martial jurisdiction, see *supra*, at 705–706, I do not think it follows that we should impose a rule of waiver so strict that it requires an individual petitioner to anticipate, at the time he appeals, a particular constitutional ruling of this Court that has yet to be rendered, especially not when the protection of a number of guarantees of the Bill of Rights is at stake. Moreover, where a new constitutional rule has been established following completion of regular proceedings in the military courts, the interests served by the exhaustion requirement can be fully satisfied by requiring that the subsequently identified claim first be presented to the military courts if a means, such as post-conviction relief,[19] exists for doing so. Cf. *Blair* v. *California*, 340 F. 2d 741 (CA9 1965); *Pennsylvania ex rel. Raymond* v. *Rundle*, 339 F. 2d 598 (CA3 1964). Yet if it is clear

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before trial as Fed. Rule Crim. Proc. 12 (b)(2) expressly requires. Rule 12 (b)(2) specifies that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial" and that failure to do so "constitutes a waiver thereof." Confronted with a situation in which a specific rule provided "for the waiver of a particular kind of constitutional claim if it be not timely asserted," 411 U. S., at 239–240, the Court concluded that preservation of the integrity of the Rule demanded that its standard should govern in the context of a collateral attack upon an indictment. This case, however, involves no such "express waiver provision," *id.*, at 239, and consequently the general waiver principles established by this Court's previous decisions must control.

[19] See Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1234 (1970); cf. *Noyd* v. *Bond*, 395 U. S., at 695 n. 7.

that those courts would reject the claim, such post-conviction resort to the military courts would, of course, be futile and is therefore unnecessary, see *Gusik* v. *Schilder*, 340 U. S., at 132–133. This is now the case here, for during the pendency of this action the Court of Military Appeals, in *Mercer* v. *Dillon*, 19 U. S. C. M. A. 264, 41 C. M. R. 264 (1970), held that the "jurisdictional" principle announced in *O'Callahan* did not apply to cases decided before the date of the *O'Callahan* decision. It therefore became clear that it would be pointless to dismiss petitioner Gosa's application in order to allow him to present his claim to the military courts,[20] and consequently, his challenge to the "jurisdiction" of the court-martial that tried him is now properly before this Court.

Since I then cannot agree with the opinion of either the plurality or MR. JUSTICE DOUGLAS, I dissent.

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[20] In any case, while his application for habeas corpus was pending in the District Court, petitioner Gosa filed a motion to vacate his conviction and sentence, on the basis of *O'Callahan*, in the Court of Military Appeals. Subsequent to the denial of relief in the District Court, the Court of Military Appeals, treating petitioner's motion as a petition for reconsideration, also denied relief. It did so, not on the basis that Gosa had waived the "jurisdictional" question by failing to present it on direct appeal, but on the basis of its previous decision in *Mercer* holding *O'Callahan* to be nonretroactive. 19 U. S. C. M. A. 327, 41 C. M. R. 327 (1970). Thus, in all events, it seems clear that Gosa has now adequately exhausted his military remedies and his previous bypass can no longer be deemed a waiver of the "jurisdictional" question, see *Warden* v. *Hayden*, 387 U. S 294, 297 n. 3 (1967).

IN RE GRIFFITHS

APPEAL FROM THE SUPREME COURT OF CONNECTICUT

No. 71–1336. Argued January 9, 1973—Decided June 25, 1973

Appellant, a resident alien, was denied permission to take the Connecticut bar examination solely because of a citizenship requirement imposed by a state court rule, which the state courts upheld against applicant's constitutional challenge. *Held:* Connecticut's exclusion of aliens from the practice of law violates the Equal Protection Clause of the Fourteenth Amendment. Classifications based on alienage, being inherently suspect, are subject to close judicial scrutiny, and here the State through appellee bar committee has not met its burden of showing the classification to have been necessary to vindicate the State's undoubted interest in maintaining high professional standards. Pp. 722–729.

162 Conn. 249, 294 A. 2d 281, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 730. REHNQUIST, J., filed a dissenting opinion, *ante*, p. 649.

R. David Broiles argued the cause for appellant. With him on the brief were *Melvin L. Wulf* and *Joel M. Gora.*

George R. Tiernan argued the cause and filed a brief for the State Bar Examining Committee of Connecticut.*

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents a novel question as to the constraints imposed by the Equal Protection Clause of the

**Louis J. Lefkowitz, pro se, Samuel A. Hirshowitz,* First Assistant Attorney General, and *Daniel M. Cohen,* Assistant Attorney General, filed a brief for the Attorney General of New York as *amicus curiae* urging affirmance.

Fourteenth Amendment on the qualifications which a State may require for admission to the bar. Appellant, Fre Le Poole Griffiths, is a citizen of the Netherlands who came to the United States in 1965, originally as a visitor. In 1967 she married a citizen of the United States and became a resident of Connecticut.[1] After her graduation from law school, she applied in 1970 for permission to take the Connecticut bar examination. The County Bar Association found her qualified in all respects save that she was not a citizen of the United States as required by Rule 8 (1) of the Connecticut Practice Book (1963),[2] and on that account refused to allow her to take the examination. She then sought judicial relief, asserting that the regulation was unconstitutional but her claim was rejected, first by the Superior Court and ultimately by the Connecticut Supreme Court. 162 Conn. 249, 294 A. 2d 281 (1972). We noted probable jurisdiction, 406 U. S. 966 (1972), and now hold that the rule unconstitutionally discriminates against resident aliens.[3]

I

We begin by sketching the background against which the State Bar Examining Committee attempts to justify

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[1] Appellant is eligible for naturalization by reason of her marriage to a citizen of the United States and residence in the United States for more than three years, 8 U. S. C. § 1430 (a). She has not filed a declaration of intention to become a citizen of the United States, 8 U. S. C. § 1445 (f), and has no present intention of doing so. Brief for Appellant 4. In order to become a citizen, appellant would be required to renounce her citizenship of the Netherlands. 8 U. S. C. § 1448 (a).

[2] The rules are promulgated by the judges of the Superior Court, Conn. Gen. Stat. Rev. § 51–80, and administered by the Connecticut Bar Examining Committee. The position of the State in this case is represented by that Committee.

[3] Because we find that the rule denies equal protection, we do not reach appellant's other claims.

the total exclusion of aliens from the practice of law. From its inception, our Nation welcomed and drew strength from the immigration of aliens. Their contributions to the social and economic life of the country were self-evident, especially during the periods when the demand for human resources greatly exceeded the native supply. This demand was by no means limited to the unskilled or the uneducated. In 1873, this Court noted that admission to the practice of law in the courts of a State

> "in no sense depends on citizenship of the United States. It has not, as far as we know, ever been made in any State, or in any case, to depend on citizenship at all. Certainly many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal courts, who were not citizens of the United States or of any State." *Bradwell* v. *State*, 16 Wall. 130, 139.[4]

But shortly thereafter, in 1879, Connecticut established the predecessor to its present rule totally excluding aliens from the practice of law. 162 Conn., at 253, 294 A. 2d, at 283. In subsequent decades, wide-ranging restrictions for the first time began to impair significantly the efforts of aliens to earn a livelihood in their chosen occupations.[5]

In the face of this trend, the Court nonetheless held in 1886 that a lawfully admitted resident alien is a "person" within the meaning of the Fourteenth Amendment's

[4] We do not, of course, rely on *Bradwell* to establish that admission to the bar may not be made to depend on citizenship. The holding of that case was simply that the right to practice law is not a "privilege or immunity" within the meaning of the Fourteenth Amendment.

[5] See J. Higham, Strangers in the Land 46, 161, 183 (1963). The full scale of restrictions imposed on the work opportunities of aliens in 1946 is shown by M. Konvitz, The Alien and the Asiatic in American Law 190–211 (1946).

directive that a State must not "deny to any person within its jurisdiction the equal protection of the laws." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. The decision in *Yick Wo* invalidated a municipal ordinance regulating the operation of laundries on the ground that the ordinance was discriminatorily enforced against Chinese operators. Some years later, the Court struck down an Arizona statute requiring employers of more than five persons to employ at least 80% "qualified electors or native-born citizens of the United States or some subdivision thereof." *Truax* v. *Raich*, 239 U. S. 33, 35 (1915). As stated for the Court by Mr. Justice Hughes:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. [Citations omitted.] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words." *Id.*, at 41.

To be sure, the course of decisions protecting the employment rights of resident aliens has not been an unswerving one.[6] In *Clarke* v. *Deckebach*, 274 U. S. 392 (1927), the Court was faced with a challenge to a city ordinance prohibiting the issuance to aliens of licenses to operate pool and billiard rooms. Characterizing the business as one having "harmful and vicious tendencies," the Court found no constitutional infirmity in the ordinance:

> "It was competent for the city to make such a choice, not shown to be irrational, by excluding from

[6] See also *People* v. *Crane*, 214 N. Y. 154, 108 N. E. 427, aff'd *sub nom. Crane* v. *New York*, 239 U. S. 195 (1915); but see *Graham* v. *Richardson*, 403 U. S. 365, 374 (1971).

> the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods." *Id.*, at 397.

This easily expandable proposition supported discrimination against resident aliens in a wide range of occupations.[7]

But the doctrinal foundations of *Clarke* were undermined in *Takahashi* v. *Fish & Game Comm'n*, 334 U. S. 410 (1948), where, in ruling unconstitutional a California statute barring issuance of fishing licenses to persons "ineligible to citizenship," the Court stated that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Id.*, at 420. Indeed, with the issue squarely before it in *Graham* v. *Richardson*, 403 U. S. 365 (1971), the Court concluded:

> "[C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority (see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate." *Id.*, at 372. (Footnotes omitted.)

The Court has consistently emphasized that a State which adopts a suspect classification "bears a heavy burden of justification," *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964), a burden which, though variously formulated, requires the State to meet certain standards of proof. In order to justify the use of a suspect classification, a State must show that its purpose or interest is

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[7] See lower court cases collected at Note, Constitutionality of Restrictions on Aliens' Right to Work, 57 Col. L. Rev. 1012, 1021–1023 (1957) (restrictions ranging from the vending of soft drinks to the selling of lightning rods).

both constitutionally permissible [8] and substantial,[9] and that its use of the classification is "necessary . . . to the accomplishment" of its purpose [10] or the safeguarding of its interest.[11]

Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities.

II

We hold that the Committee, acting on behalf of the State, has not carried its burden. The State's ultimate interest here implicated is to assure the requisite qualifications of persons licensed to practice law.[12] It is undisputed that a State has a constitutionally permissible and substantial interest in determining whether an appli-

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[8] Discrimination or segregation for its own sake is not, of course, a constitutionally permissible purpose. *E. g., Brown* v. *Board of Education,* 347 U. S. 483, 495 (1954); *McLaughlin* v. *Florida,* 379 U. S. 184 (1964).

[9] The state interest required has been characterized as "overriding," *id.,* at 196; *Loving* v. *Virginia,* 388 U. S. 1, 11 (1967); "compelling," *Graham* v. *Richardson, supra,* at 375; "important," *Dunn* v. *Blumstein,* 405 U. S. 330, 343 (1972), or "substantial," *ibid.* We attribute no particular significance to these variations in diction.

[10] *McLaughlin* v. *Florida, supra,* at 196; cf. *Loving* v. *Virginia, supra,* at 11.

[11] We did not decide in *Graham* nor do we decide here whether special circumstances, such as armed hostilities between the United States and the country of which an alien is a citizen, would justify the use of a classification based on alienage.

[12] Appellant denies that this was indeed the State's purpose in requiring citizenship for the practice of law, noting that citizenship is also required of practitioners in other fields, including hairdressers and cosmeticians, Conn. Gen. Stat. Rev. § 20-250, architects, Conn. Gen. Stat. Rev. § 20-291, and sanitarians, Conn. Gen. Stat. Rev. § 20-361. Because we dispose of the case on other grounds, we do not reach this claim.

cant possesses " 'the character and general fitness requisite for an attorney and counselor-at-law.' " *Law Students Research Council* v. *Wadmond*, 401 U. S. 154, 159 (1971). See also *Konigsberg* v. *State Bar*, 366 U. S. 36, 40–41 (1961); *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239 (1957).[13] But no question is raised in this case as to appellant's character or general fitness. Rather, the sole basis for disqualification is her status as a resident alien.

The Committee defends Rule 8 (1)'s requirement that applicants for admission to the bar be citizens of the United States on the ground that the special role of the lawyer justifies excluding aliens from the practice of law. In Connecticut, the Committee points out, the maxim that a lawyer is an "officer of the court" is given concrete meaning by a statute which makes every lawyer a "commissioner of the Superior Court." As such, a lawyer has authority to "sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgements of deeds." Conn. Gen. Stat. Rev. § 51–85. In the exercise of this authority, a Connecticut lawyer may command the assistance of a county sheriff or a town constable. Conn. Gen. Stat. Rev. § 52–90. Because of these and other powers, the Connecticut Supreme Court commented that

> "[t]he courts not only demand [lawyers'] loyalty, confidence and respect but also require them to function in a manner which will foster public confidence

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[13] In this connection, Mr. Justice Frankfurter wrote:

"From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character.' " *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 247 (1957) (concurring opinion).

> in the profession and, consequently, the judicial system." 162 Conn., at 262–263, 294 A. 2d, at 287.

In order to establish a link between citizenship and the powers and responsibilities of the lawyer in Connecticut, the Committee contrasts a citizen's undivided allegiance to this country with a resident alien's possible conflict of loyalties. From this, the Committee concludes that a resident alien lawyer might in the exercise of his functions ignore his responsibilities to the courts or even his clients in favor of the interest of a foreign power.

We find these arguments unconvincing. It in no way denigrates a lawyer's high responsibilities to observe that the powers "to sign writs and subpoenas, take recognizances, [and] administer oaths" hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens. Nor do we think that the practice of law offers meaningful opportunities adversely to affect the interest of the United States. Certainly the Committee has failed to show the relevance of citizenship to any likelihood that a lawyer will fail to protect faithfully the interest of his clients.[14]

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[14] Lawyers frequently represent foreign countries and the nationals of such countries in litigation in the courts of the United States, as well as in other matters in this country. In such representation, the duty of the lawyer, subject to his role as an "officer of the court," is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State. But this representation involves no conflict of interest in the invidious sense. Rather, it casts the lawyer in his honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client, whoever it may be. It is conceivable that an alien licensed to practice law in this country could find himself in a position in which he might be called upon to represent his country of citizenship against the United States in circumstances in which there may be a conflict between his obligations to the two countries. In such rare situations, an honorable person, whether an alien or not, would decline the representation.

Nor would the possibility that some resident aliens are unsuited to the practice of law be a justification for a wholesale ban.

> "Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory. Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356." *Schware* v. *Board of Bar Examiners,* 353 U. S., at 239.

This constitutional warning is especially salient where, as here, a State's bar admission standards make explicit use of a suspect classification. Although, as we have acknowledged, a State does have a substantial interest in the qualifications of those admitted to the practice of law, the arguments advanced by the Committee fall short of showing that the classification established by Rule 8 (1) of the Connecticut Practice Book (1963) is necessary to the promoting or safeguarding of this interest.

Connecticut has wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law. Connecticut can, and does, require appropriate training and familiarity with Connecticut law. Apart from such tests of competence, it requires a new lawyer to take both an "attorney's oath" to perform his functions faithfully and honestly [15] and a "commissioner's oath" to "support

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[15] The text of the attorney's oaths is as follows:

"You solemnly swear that you will do no falsehood, nor consent to any to be done in court, and, if you know of any to be done, you will give information thereof to the judges, or one of them, that it may be reformed; you will not wittingly, or willingly promote, sue or cause to be sued, any false or unlawful suit, or give aid, or consent, to the same; you will delay no man for lucre or malice; but will exercise the office of attorney, within the court wherein you may practice, according to the best of your learning and discretion, and

the constitution of the United States, and the constitution of the state of Connecticut." [16] Appellant has indicated her willingness and ability to subscribe to the substance of both oaths,[17] and Connecticut may quite properly conduct a character investigation to insure in any given case "that an applicant is not one who 'swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath.' *Bond* v. *Floyd*, 385 U. S. 116, 132." *Law Students Research Council* v. *Wadmond*, 401 U. S., at 164.[18] Moreover, once

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with fidelity, as well to the court as to your client, so help you God." Jurisdictional Statement 44.

[16] There is no question as to the validity of requiring an applicant, as a precondition to admission to the bar, to take such an oath. *Law Students Research Council* v. *Wadmond*, 401 U. S. 154, 161–164 (1970).

[17] Because the commissioner's oath is an oath to "support the constitution of the United States, and the constitution of the State of Connecticut, *so long as you continue a citizen thereof*," Conn. Gen. Stat. Rev. § 1–25 (emphasis added), appellant could not of course take the oath as prescribed. To the extent that the oath reiterates Rule 8 (1)'s citizenship requirement, it shares the same constitutional defects when required of prospective members of the bar.

[18] We find no merit in the contention that only citizens can in good conscience take an oath to support the Constitution. We note that all persons inducted into the Armed Services, including resident aliens, are required by 10 U. S. C. § 502 to take the following oath:

"I, ————————, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God."

If aliens can take this oath when the Nation is making use of their services in the national defense, resident alien applicants for admission to the bar surely cannot be precluded, as a class, from taking an oath to support the Constitution on the theory that they are unable to take the oath in good faith.

admitted to the bar, lawyers are subject to continuing scrutiny by the organized bar and the courts. In addition to discipline for unprofessional conduct, the range of post-admission sanctions extends from judgments for contempt to criminal prosecutions and disbarment.[19] In sum, the Committee simply has not established that it must exclude all aliens from the practice of law in order to vindicate its undoubted interest in high professional standards.[20]

III

In its brief, the Examining Committee makes another, somewhat different argument in support of Rule 8 (1). Its thrust is not that resident aliens lack the attributes necessary to maintain high standards in the legal profession, but rather that lawyers must be citizens almost as a matter of definition. The implication of this analysis is that exclusion of aliens from the legal profession is not subject to any scrutiny under the Equal Protection Clause.

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[19] See, *e. g.*, *Doolittle* v. *Clark*, 47 Conn. 316 (1879). Apart from the courts, the profession itself has long subjected its members to discipline under codes or canons of professional ethics. As early as 1908 the American Bar Association adopted 32 Canons of Professional Ethics. In 1970, following several years of study and reexamination, the House of Delegates of the American Bar Association approved a new Code of Professional Responsibility, which provides detailed ethical prescriptions as well as a comprehensive code of disciplinary rules. The ABA Code of Professional Responsibility has since been approved and adopted in the District of Columbia and in 46 States, including Connecticut.

[20] Nothing in our rules prohibits from admission to practice in this Court resident aliens who have been admitted to practice "for three years past in the highest court of a State, Territory, District, Commonwealth, or Possession" and whose "private and professional characters shall appear to be good." Rule 5, Rules of the Supreme Court.

The argument builds upon the exclusion of aliens from the franchise in all 50 States and their disqualification under the Constitution from holding office as President, Art. 2, § 1, cl. 5, or as a member of the House of Representatives, Art. 1, § 2, cl. 2, or of the Senate, Art. 1, § 3, cl. 3. These and numerous other federal and statutory and constitutional provisions reflect, the Committee contends, a pervasive recognition that "participation in the government structure as voters and office holders" is inescapably an aspect of citizenship. Brief for Appellee 11. Offered in support of the claim that the lawyer is an "office holder" in this sense is an enhanced version of the proposition, discussed above, that he is an "officer of the court." Specifically, the Committee states that the lawyer "is an officer of the Court who acts by and with the authority of the State" and is entrusted with the "exercise of actual government power." *Id.*, at 5.

We note at the outset that this argument goes beyond the opinion of the Connecticut Supreme Court, which recognized that a lawyer is not an officer in the ordinary sense. 162 Conn., at 254, 294 A. 2d, at 283. This comports with the view of the Court expressed by Mr. Justice Black in *Cammer* v. *United States*, 350 U. S. 399 (1956):

> "It has been stated many times that lawyers are 'officers of the court.' One of the most frequently repeated statements to this effect appears in *Ex parte Garland*, 4 Wall. 333, 378. The Court pointed out there, however, that an attorney was not an 'officer' within the ordinary meaning of that term. Certainly nothing that was said in *Ex parte Garland* or in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important though

> it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word 'officer' as it has always been applied to lawyers conveys quite a different meaning from the word 'officer' as applied to people serving as officers within the conventional meaning of that term." *Id.*, at 405 (footnote omitted).

Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy.[21]

We hold that § 8 (1) violates the Equal Protection Clause.[22] The judgment of the Connecticut Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[For dissenting opinion of MR. JUSTICE REHNQUIST, see *ante*, p. 649.]

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[21] Because the Committee has failed to establish that the lawyer is an "office holder," we need not and do not decide whether there is merit in the general argument and, if so, to what offices it would apply.

[22] In a thoughtful opinion, the California Supreme Court unanimously declared unconstitutional a similar California rule. *Raffaelli* v. *Committee of Bar Examiners*, 7 Cal. 3d 288, 496 P. 2d 1264 (1972). See also *Application of Park*, 484 P. 2d 690 (Alaska 1971).

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, dissenting.

I agree generally with MR. JUSTICE REHNQUIST's dissent and add a few observations.

In the rapidly shrinking "one world" we live in there are numerous reasons why the States might appropriately consider relaxing some of the restraints on the practice of professions by aliens. The fundamental factor, however, is that the States reserved, among other powers, that of regulating the practice of professions within their own borders. If that concept has less validity now than in the 18th century when it was made part of the "bargain" to create a federal union, it is nonetheless part of that compact.

A large number of American nationals are admitted to the practice of law in more than a dozen countries; this will expand as world trade enlarges. But the question for the Court is not what is enlightened or sound *policy* but rather what the Constitution and its Amendments provide; I am unable to accord to the Fourteenth Amendment the expansive reading the Court gives it.

In recent years the Court, in a rather casual way, has articulated the code phrase "suspect classification" as though it embraced a reasoned constitutional concept. Admittedly, it simplifies judicial work as do "per se" rules, but it tends to stop analysis while appearing to suggest an analytical process.

Much as I agree with some aspects of the *policy* implicit in the Court's holding, I am bound—if I apply the Constitution as its words and intent speak to me—to reject the good policy the Court now adopts.

I am unwilling to accept what seems to me a denigration of the posture and role of a lawyer as an "officer of the court." It is that role that a State is entitled to rely on as a basis for excluding aliens from the practice

of law. By virtue of his admission a lawyer is granted what can fairly be called a monopoly of sorts; he is granted a license to appear and try cases; he can cause witnesses to drop their private affairs and be called for depositions and other pretrial processes that, while subject to the ultimate control of the court, are conducted by lawyers outside courtrooms; the enormous power of cross-examination of witnesses is granted exclusively to lawyers. Inherent in these large powers is the ability to compel answers subject, of course, to such limiting restraints as the Fifth Amendment and rules of evidence. In most States a lawyer is authorized to issue subpoenas commanding the presence of persons and even the production of documents under certain circumstances. The broad monopoly granted to lawyers is the authority to practice a profession and by virtue of that to do things other citizens may not lawfully do. In the common-law tradition the lawyer becomes the attorney—the *agent*—for a client only by virtue of his having been first invested with power by the State, usually by a court. The lawyer's obligations as an officer of the court permit the court to call on the lawyer to perform duties which no court could order citizens generally to do, including the obligation to observe codes of ethical conduct not binding on the public generally.

The concept of a lawyer as an officer of the court and hence part of the official mechanism of justice in the sense of other court officers, including the judge, albeit with different duties, is not unique in our system but it is a significant feature of the lawyer's role in the common law. This concept has sustained some erosion over the years at the hands of cynics who view the lawyer much as the "hired gun" of the Old West. In less flamboyant terms the lawyer in his relation to the client came to be called a "mouthpiece" in the gangland parlance of the 1930's. Under this bleak view of the profession the

lawyer, once engaged, does his client's bidding, lawful or not, ethical or not.

Whatever the erosion of the officer-of-the-court role, the overwhelming proportion of the legal profession rejects both the denigrated role of the advocate and counselor that renders him a lackey to the client and the alien idea that he is an agent of government. See American Bar Association Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function § 1.1 (Approved Draft 1971).

The role of a lawyer as an officer of the court predates the Constitution; it was carried over from the English system and became firmly embedded in our tradition. It included the obligation of first duty to client. But that duty never was and is not today an absolute or unqualified duty. It is a first loyalty to serve the client's interest but always within—never outside—the law, thus placing a heavy personal and individual responsibility on the lawyer. That this is often unenforceable, that departures from it remain undetected, and that judges and bar associations have been singularly tolerant of misdeeds of their brethren, renders it no less important to a profession that is increasingly crucial to our way of life. The very independence of the lawyer from the government on the one hand and client on the other is what makes law a profession, something apart from trades and vocations in which obligations of duty and conscience play a lesser part. It is as crucial to our system of justice as the independence of judges themselves.

The history of the legal profession is filled with accounts of lawyers who risked careers by asserting their independent status in opposition to popular and governmental attitudes, as John Adams did in Boston to defend the soldiers accused in what we know in our folklore as the "Boston Massacre." To that could be added the

lawyers who defended John Peter Zenger and down to lawyers in modern times in cases such as *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). The crucial factor in all these cases is that the advocates performed their dual role—officer of the court and advocate for a client—strictly within and never in derogation of high ethical standards. There is thus a reasonable, rational basis for a State to conclude that persons owing first loyalty to this country will grasp these traditions and apply our concepts more than those who seek the benefits of American citizenship while declining to accept the burdens of citizenship in this country.

In some countries the legal system is so structured that all lawyers are literally agents of government and as such bound to place the interests of government over those of the client. That concept is so alien to our system with an independent bar that I find it difficult to see how nationals of such a country, inculcated with those ideas and at the same time unwilling to accept American citizenship, could be properly integrated into our system. At the very least we ought not stretch the Fourteenth Amendment to force the States to accept any national of any country simply because of a recital of the required oath and passing of the bar examination.

Since the Court now strikes down a power of the States accepted as fundamental since 1787, even if States sometimes elected not to exercise it, cf. *Bradwell* v. *State*, 16 Wall. 130 (1873), the States may well move to adopt, by statute or rule of court, a reciprocal proviso, familiar in other contexts; under such a reciprocal treatment of applicants a State would admit to the practice of law the nationals of such other countries as admit American citizens to practice. I find nothing in the core holding of *Zschernig* v. *Miller*, 389 U. S. 429 (1968), to foreclose state adoption of such reciprocal provisions. See *Clark* v. *Allen*, 331 U. S. 503 (1947).

HUNT *v.* McNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

No. 71–1523. Argued February 21, 1973—Decided June 25, 1973

In this action for injunctive and declaratory relief appellant challenges the South Carolina Educational Facilities Authority Act as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds benefiting a Baptist-controlled college. The Act establishes an Educational Facilities Authority to assist (through the issuance of revenue bonds) higher educational institutions in constructing and financing projects, such as buildings, facilities, and site preparation, but not including any facility for sectarian instruction or religious worship. Neither the State nor the Authority is obligated, directly or indirectly, to pay the principal of or interest on the bonds; nor is the State's taxing power pledged or implicated. All expenses of the Authority also must be paid solely from the revenues of the projects. The Authority gave preliminary approval to an application submitted by the college, only 60% of whose students are Baptists. As subsequently modified, the application requests the issuance of revenue bonds to be used for refinancing capital improvements and completing the dining hall. Under the statutory scheme the project would be conveyed to the Authority, which would lease it back to the college, with reconveyance to the college on full payment of the bonds. The lease agreement would contain a clause obligating the institution to observe the Act's restrictions on sectarian use and enabling the Authority to conduct inspections. The provision for reconveyance would restrict the project to nonsectarian use. The trial court denied appellant relief, and the State Supreme Court affirmed. After this Court had vacated the judgment and remanded the case for reconsideration in the light of *Lemon* v. *Kurtzman*, 403 U. S. 602, and other intervening decisions, the State Supreme Court adhered to its earlier decision. *Held:* The Act as construed by the South Carolina Supreme Court does not, under the guidelines of *Lemon* v. *Kurtzman*, *supra*, at 612–613, violate the Establishment Clause. Pp. 741–749.

(a) The purpose of the Act is secular, the benefits of the statute being available to all institutions of higher education in the

State, whether or not they have a religious affiliation. Pp. 741–742.

(b) The statute does not have the primary effect of advancing or inhibiting religion. The college involved has no significant sectarian orientation and the project must be confined to a secular purpose, with the lease agreement, enforced by inspection provisions, forbidding religious use. Pp. 742–745.

(c) The statute does not foster an excessive entanglement with religion. The record here does not show that religion so permeates the college that inspection by the Authority to insure that the project is not used for religious purposes would necessarily lead to such entanglement. The Authority's statutory power to participate in certain management decisions also does not have that effect, in view of the narrow construction by the State Supreme Court, limiting such power to insuring that the college's fees suffice to meet bond payments. Absent default, the lease agreement would leave full responsibility with the college regarding fees and general operations. Pp. 745–749.

258 S. C. 97, 187 S. E. 2d 645, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 749.

Robert McC. Figg, Jr., argued the cause for appellant. With him on the brief was *Thomas B. Bryant, Jr.*

Huger Sinkler argued the cause for appellees. With him on the brief were *Daniel R. McLeod*, Attorney General of South Carolina, and *Theodore B. Guerard.**

MR. JUSTICE POWELL delivered the opinion of the Court.

Appellant, a South Carolina taxpayer, brought this action to challenge the South Carolina Educational Facilities Authority Act (the Act), S. C. Code Ann. § 22–

**George F. Kugler, Jr.*, Attorney General, *Stephen Skillman*, Assistant Attorney General, and *Charles R. Parker* and *Lewis M. Popper*, Deputy Attorneys General, filed a brief for the State of New Jersey as *amicus curiae* urging affirmance.

41 *et seq.* (Supp. 1971), as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds for the benefit of the Baptist College at Charleston (the College).[1] The trial court's denial of relief was affirmed by the Supreme Court of South Carolina. 255 S. C. 71, 177 S. E. 2d 362 (1970). This Court vacated the judgment and remanded the case for reconsideration in light of the intervening decisions in *Lemon* v. *Kurtzman, Earley* v. *DiCenso,* and *Robinson* v. *DiCenso,* 403 U. S. 602 (1971); and *Tilton* v. *Richardson,* 403 U. S. 672 (1971). 403 U. S. 945 (1971). On remand, the Supreme Court of South Carolina adhered to its earlier position. 258 S. C. 97, 187 S. E. 2d 645 (1972). We affirm.

I

We begin by setting out the general structure of the Act. The Act established an Educational Facilities Authority (the Authority), the purpose of which is "to assist institutions for higher education in the construction, financing and refinancing of projects . . . ," S. C. Code Ann. § 22–41.4 (Supp. 1971), primarily through the issuance of revenue bonds. Under the terms of the Act, a project may encompass buildings, facilities, site preparation, and related items, but may not include

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school

[1] At various points during this litigation, appellant has made reference to the Free Exercise Clause of the First Amendment, but has made no arguments specifically addressed to violations of that Clause except insofar as this Court's approach to cases involving the Religion Clauses represents an interaction of the two Clauses.

> or department of divinity for any religious denomination." S. C. Code Ann. § 22–41.2 (b) (Supp. 1971).

Correspondingly, the Authority is accorded certain powers over the project, including the powers to determine the fees to be charged for the use of the project and to establish regulations for its use. See *infra*, at 747–749.

While revenue bonds to be used in connection with a project are issued by the Authority, the Act is quite explicit that the bonds shall not be obligations of the State, directly or indirectly:

> "Revenue bonds issued under the provisions of this chapter shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement to the effect that neither the State of South Carolina nor the Authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this chapter shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment." S. C. Code Ann. § 22–41.10 (Supp. 1971).

Moreover, since all of the expenses of the Authority must be paid from the revenues of the various projects in which it participates, S. C. Code Ann. § 22–41.5 (Supp. 1971), none of the general revenues of South Carolina is used to support a project.

On January 6, 1970, the College submitted to the Authority for preliminary approval an application for the issuance of revenue bonds. Under the proposal, the Authority would issue the bonds and make the proceeds available to the College for use in connection with a portion of its campus to be designated a project (the Project) within the meaning of the Act. In return, the College would convey the Project, without cost, to the Authority, which would then lease the property so conveyed back to the College. After payment in full of the bonds, the Project would be reconveyed to the College. The Authority granted preliminary approval on January 16, 1970, 255 S. C., at 76, 177 S. E. 2d, at 365.

In its present form, the application requests the issuance of revenue bonds totaling $1,250,000, of which $1,050,000 would be applied to refund short-term financing of capital improvements and $200,000 would be applied to the completion of dining hall facilities.[2] The

[2] As originally submitted by the College and approved by the Authority, the proposal called for the issuance of "not exceeding $3,500,000 of revenue bonds . . . ." 255 S. C. 71, 75, 177 S. E. 2d 362, 364. As indicated by a stipulation of counsel in this Court, the College subsequently secured a bank loan in the amount of $2,500,000 and now proposes the issuance of only $1,250,000 in revenue bonds under the Act, the proceeds to be used:

"(i) to repay in full the College's Current Fund for the balance (approximately $250,000) advanced to the College's Plant Fund as aforesaid; (ii) to refund outstanding short-term loans in the amount of $800,000 whose proceeds were to pay off indebtedness incurred for *capital improvements*, and (iii) to finance the completion of the dining hall facilities at a cost of approximately $200,000." App. 49. (Emphasis in original.)

advantage of financing educational institutions through a state-created authority derives from relevant provisions of federal and South Carolina state income tax laws which provide in effect that the interest on such bonds is not subject to income taxation.[3] The income-tax-exempt status of the interest enables the Authority, as an instrumentality of the State, to market the bonds at a significantly lower rate of interest than the educational institution would be forced to pay if it borrowed the money by conventional private financing.

Because the College's application to the Authority was a preliminary one, the details of the financing arrangement have not yet been fully worked out. But Rules and Regulations adopted by the Authority govern certain of its aspects. See Jurisdictional Statement, Appendix C, pp. 47–51. Every lease agreement between the Authority and an institution must contain a clause

> "obligating the Institution that neither the leased land, nor the facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination." 258 S. C., at 101, 187 S. E. 2d, at 647.

To insure that this covenant is honored, each lease agreement must allow the Authority to conduct inspections, and any reconveyance to the College must contain a

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[3] Gross income for federal income tax purposes does not include interest on "the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing . . . ." 26 U. S. C. § 103 (a)(1). For state income tax purposes, gross income does not include interest "upon obligations of the United States or its possessions or of this State or any political subdivision thereof . . . ." S. C. Code Ann. § 65–253 (4) (Supp. 1971).

restriction against use for sectarian purposes.[4] The Rules further provide that simultaneously with the execution of the lease agreement, the Authority and the trustee bank would enter into a Trust Indenture which would create, for the benefit of the bondholders, a foreclosable mortgage lien on the Project property including a mortgage on the "right, title and interest of the Authority in and to the Lease Agreement." Jurisdictional Statement, Appendix C, p. 50.

Our consideration of appellant's Establishment Clause claim extends only to the proposal as approved preliminarily with such additions as are contemplated by the Act, the Rules, and the decisions of the courts below.

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[4] Rule 4 relating to the Lease Agreement provides in part that:

"If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination." 258 S. C. 97, 101–102, 187 S. E. 2d 645, 647–648.

The Rule goes on to allow the institution to remove this option in the case of involuntary sales:

"The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof." 258 S. C., at 102, 187 S. E. 2d, at 648. See n. 6, *infra*.

II

As we reaffirm today in *Committee for Public Education & Religious Liberty* v. *Nyquist, post,* p. 756, the principles which govern our consideration of challenges to statutes as violative of the Establishment Clause are three:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman,* 403 U. S., at 612–613.

With full recognition that these are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three "tests": purpose, effect, and entanglement.

A

The purpose of the statute is manifestly a secular one. The benefits of the Act are available to all institutions of higher education in South Carolina, whether or not having a religious affiliation. While a legislature's declaration of purpose may not always be a fair guide to its true intent, appellant makes no suggestion that the introductory paragraph of the Act represents anything other than a good-faith statement of purpose:

> "It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within

the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this chapter to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this chapter, all to the public benefit and good, to the extent and manner provided herein." S. C. Code Ann. § 22.41 (Supp. 1971).

The College and other private institutions of higher education provide these benefits to the State.[5] As of the academic year 1969–1970, there were 1,548 students enrolled in the College, in addition to approximately 600 night students. Of these students, 95% are residents of South Carolina who are thereby receiving a college education without financial support from the State of South Carolina.

B

To identify "primary effect," we narrow our focus from the statute as a whole to the only transaction presently before us. Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. *E. g.*,

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[5] In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), this Court commented on the importance of the role of private education in this country:

"Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience." *Id.*, at 247.

Bradfield v. *Roberts*, 175 U. S. 291 (1899); *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970); *Tilton* v. *Richardson*, 403 U. S. 672 (1971). Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. In *Tilton* v. *Richardson, supra*, the Court refused to strike down a direct federal grant to four colleges and universities in Connecticut. MR. CHIEF JUSTICE BURGER, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was pervasively sectarian, but held open that possibility for future cases:

> "Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." *Id.*, at 682.

Appellant has introduced no evidence in the present case placing the College in such a category. It is true that the members of the College Board of Trustees are elected by the South Carolina Baptist Convention, that the approval of the Convention is required for certain financial transactions, and that the charter of the College may be amended only by the Convention. But it was likewise true of the institutions involved in *Tilton* that they were "governed by Catholic religious organizations." *Id.*, at 686. What little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership or student

admission, and that only 60% of the College student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina. 255 S. C., at 85, 177 S. E. 2d, at 369. On the record in this case there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education.

Nor can we conclude that the proposed transaction will place the Authority in the position of providing aid to the religious as opposed to the secular activities of the College. The scope of the Authority's power to assist institutions of higher education extends only to "projects," and the Act specifically states that a project "shall not include" any buildings or facilities used for religious purposes. In the absence of evidence to the contrary, we must assume that all of the proposed financing and refinancing relates to buildings and facilities within a properly delimited project. It is not at all clear from the record that the portion of the campus to be conveyed by the College to the Authority and leased back is the same as that being financed, but in any event it too must be part of the Project and subject to the same prohibition against use for religious purposes. In addition, as we have indicated, every lease agreement must contain a clause forbidding religious use and another allowing inspections to enforce the agreement.[6] For these reasons,

[6] Appellant also takes issue with the Authority's rule allowing a purchaser at an involuntary sale to take title free of restrictions as to religious use. See n. 4, *supra*. Appellant's reliance on *Tilton* v. *Richardson*, 403 U. S. 672 (1971), in this respect is misplaced. There, the Court struck down a provision under which the church-related colleges would have unrestricted use of a federally financed project after 20 years. In the present case, by contrast, the restriction against religious use is lifted, not as to the institution seeking the assistance of the Authority nor as to voluntary transferees, but only as to a purchaser at a judicial sale. Because some other religious institution bidding for the property at a judicial sale could purchase the prop-

we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion.[7]

C

The final question posed by this case is whether under the arrangement there would be an unconstitutional degree of entanglement between the State and the College. Appellant argues that the Authority would become involved in the operation of the College both by inspecting the project to insure that it is not being used for religious

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erty only by outbidding all other prospective purchasers, there is only a speculative possibility that the absence of a use limitation would ever afford aid to religion. Even in such an event, the acquiring religious institution presumably would have had to pay the then fair value of the property.

[7] The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." *Clayton* v. *Kervick*, 56 N. J. 523, 530–531, 267 A. 2d 503, 506–507 (1970). The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." 258 S. C., at 107, 187 S. E. 2d, at 650. Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under *Lemon* and *Tilton*, we need not decide whether, as appellees argue, Brief for Appellees 14, the importance of the tax exemption in the South Carolina scheme brings the present case under *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970), where this Court upheld a local property tax exemption which included religious institutions.

purposes and by participating in the management decisions of the College.

The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution. In finding excessive entanglement, the Court in *Lemon* relied on the "substantial religious character of these church-related" elementary schools. 403 U. S., at 616. MR. CHIEF JUSTICE BURGER'S opinion for the plurality in *Tilton* placed considerable emphasis on the fact that the federal aid there approved would be spent in a college setting:

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education." 403 U. S., at 687.

Although MR. JUSTICE WHITE saw no such clear distinction, he concurred in the judgment, stating:

> "It is enough for me that . . . the Federal Government [is] financing a separable secular function of overriding importance in order to sustain the legislation here challenged." 403 U. S., at 664.

A majority of the Court in *Tilton,* then, concluded that on the facts of that case inspection as to use did not threaten excessive entanglement. As we have indicated above, there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton.*[8]

[8] Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent

A closer issue under our precedents is presented by the contention that the Authority could become deeply involved in the day-to-day financial and policy decisions of the College. The Authority is empowered by the Act:

> "(g) [g]enerally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project or any portion thereof and to contract with any person, partnership, association or corporation or other body public or private in respect thereof;
>
> "(h) [t]o establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the use of a project undertaken for such participating institution for higher education. . . ." S. C. Code Ann. § 22–41.4 (Supp. 1971).

These powers are sweeping ones, and were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems with the proposed transaction would not be insignificant.

As the South Carolina Supreme Court pointed out, 258 S. C., at 107, 187 S. E. 2d, at 651, the Act was patterned closely after the South Carolina Industrial Revenue Bond Act, and perhaps for this reason appears to

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to which the College is church related, cf. *Board of Education* v. *Allen*, 392 U. S., at 248, and he has failed to show more than a formalistic church relationship. As *Tilton* established, formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause. So far as the record here is concerned, there is no showing that the College places any special emphasis on Baptist denominational or any other sectarian type of education. As noted above, both the faculty and the student body are open to persons of any (or no) religious affiliation.

confer unnecessarily broad power and responsibility on the Authority. The opinion of that court, however, reflects a narrow interpretation of the practical operation of these powers:

> "Counsel for plaintiff argues that the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College. We do not so construe the Act. . . . [T]he basic function of the Authority is to see . . . that fees are charged sufficient to meet the bond payments." *Id.*, at 108, 187 S. E. 2d, at 651.

As we read the College's proposal, the Lease Agreement between the Authority and the College will place on the College the responsibility for making the detailed decisions regarding the government of the campus and the fees to be charged for particular services. Specifically, the proposal states that the Lease Agreement

> "will unconditionally obligate the College (a) to pay sufficient rentals to meet the principal and interest requirements as they become due on such bonds, [and] (b) to impose an adequate schedule of charges and fees in order to provide adequate revenues with which to operate and maintain the said facilities and to make the rental payments . . . ." App. 18.

In short, under the proposed Lease Agreement, neither the Authority nor a trustee bank would be justified in taking action unless the College fails to make the prescribed rental payments or otherwise defaults in its obligations. Only if the College refused to meet rental payments or was unable to do so would the Authority or the trustee be obligated to take further action. In that event, the Authority or trustee might either fore-

close on the mortgage or take a hand in the setting of rules, charges, and fees. It may be argued that only the former would be consistent with the Establishment Clause, but we do not now have that situation before us.

III

This case comes to us as an action for injunctive and declaratory relief to test the constitutionality of the Act as applied to a proposed—rather than an actual—issuance of revenue bonds. The specific provisions of the Act under which the bonds will be issued, the Rules and Regulations of the Authority, and the College's proposal—all as interpreted by the South Carolina Supreme Court—confine the scope of the assistance to the secular aspects of this liberal arts college and do not foreshadow excessive entanglement between the State and religion. Accordingly, we affirm the holding of the court below that the Act is constitutional as interpreted and applied in this case.

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The question presented in this case is whether South Carolina's assistance to the Baptist College at Charleston under the South Carolina Educational Facilities Authority Act constitutes constitutionally impermissible aid by the State for this sectarian institution.[1] The test to which I adhere for determining such questions is whether the arrangement between the State and the

[1] No one denies that the Baptist College at Charleston is a "sectarian" institution—*i. e.*, one "in which the propagation and advancement of a particular religion are a function or purpose of the institution." *Lemon* v. *Kurtzman*, 403 U. S. 602, 659 (1971) (separate opinion of BRENNAN, J.).

Baptist College is foreclosed under the Establishment Clause of the First Amendment as being among

> "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice." *Abington School District* v. *Schempp*, 374 U. S. 203, 295 (1963) (BRENNAN, J., concurring); *Walz* v. *Tax Comm'n*, 397 U. S. 664, 680–681 (1970) (BRENNAN, J., concurring); *Lemon* v. *Kurtzman*, 403 U. S. 602, 643 (1971) (*Lemon I*) (separate opinion of BRENNAN, J.).

Because under that test it is clear to me that the State's proposed scheme of assistance to the Baptist College is violative of the Establishment Clause, I dissent.

The act authorizes a financing arrangement between the Authority [2] and the Baptist College at Charleston, a South Carolina educational corporation operated by the South Carolina Baptist Convention. Under that arrangement, the College would convey a substantial portion of its campus to the Authority, and the Authority would lease back the property to the College at an agreed rental. The Authority would then issue revenue bonds of the State of South Carolina in the amount of $3,500,000, which bonds would be payable, principal

[2] The South Carolina Educational Facilities Authority is composed of the members of the State Budget and Control Board, who are the Governor, the State Treasurer, the State Comptroller General, the Chairman of the Finance Committee of the State Senate, and the Chairman of the Ways and Means Committee of the State House of Representatives. The Act states that "all the functions and powers of the Authority are hereby granted to the State Budget and Control Board as an incident of its functions in connection with the public finances of the State." S. C. Code Ann. § 22–41.3 (Supp. 1971).

and interest, from the rents paid by the College to the Authority under the lease. The proceeds of the sale of the bonds would be used to pay off outstanding indebtedness of the College [3] and to construct additional buildings and facilities for use in its higher education operations. Upon payment in full of the principal and interest on the bonds, the arrangement requires that the Authority reconvey title to the campus properties to the College free and clear of all liens and encumbrances. The arrangement does not, however, amount merely to a mortgage on the campus property. The Authority is also empowered, *inter alia,* to determine the location and character of any project financed under the act; to construct, maintain, manage, operate, lease as lessor or lessee, and regulate the same; to enter into contracts for the management and operation of such project; to establish rules and regulations for the use of the project or any portion thereof; and to fix and revise from time to time rates, rents, fees, and charges for the use of a project and for the services furnished or to be furnished by a project or any portion thereof. In other words, the College turns over to the State Authority control of substantial parts of the fiscal operation of the school—its very life's blood.

It is true that the Act expressly provides that State financing will not be provided for

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomi-

[3] This outstanding indebtedness pertains to certain unspecified "capital improvements." App. 49. Thus, it may be that the indebtedness was incurred for improvements to facilities used for religious purposes.

> nation." S. C. Code Ann. § 22–41.2 (b) (Supp. 1971).

And it is also true that the Authority, pursuant to granted rule-making power, has adopted a rule requiring that each lease agreement contain a covenant

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination." 258 S. C., at 101, 187 S. E. 2d, at 647.

But policing by the Authority to insure compliance with these restrictions is established by a provision required to be included in the lease agreement allowing the Authority to conduct on-site inspections of the facilities financed under the act.

Thus, it is crystal clear, I think, that this scheme involves the State in a degree of policing of the affairs of the College far exceeding that called for by the statutes struck down in *Lemon I, supra.* See also *Johnson* v. *Sanders,* 319 F. Supp. 421 (Conn. 1970), aff'd, 403 U. S. 955 (1971). Indeed, under this scheme the policing by the State can become so extensive that the State may well end up in complete control of the operation of the College, at least for the life of the bonds. The College's freedom to engage in religious activities and to offer religious instruction is necessarily circumscribed by this pervasive state involvement forced upon the College if it is not to lose its benefits under the Act. For it seems inescapable that the content of courses taught in facilities financed under the agreement must be closely monitored by the State Authority in discharge of its duty to ensure that the facilities are not being used for sectarian instruction. The Authority must also involve itself

deeply in the fiscal affairs of the College, even to the point of fixing tuition rates, as part of its duty to assure sufficient revenues to meet bond and interest obligations. And should the College find itself unable to meet these obligations, its continued existence as a viable sectarian institution is almost completely in the hands of the State Authority. Thus, this agreement, with its consequent state surveillance and ongoing administrative relationships, inescapably entails mutually damaging Church-State involvements. *Abington School District* v. *Schempp,* 374 U. S., at 295 (BRENNAN, J., concurring); *Lemon I,* 403 U. S., at 649 (separate opinion of BRENNAN, J.).

In support of its contrary argument, the Court adopts much of the reasoning of the plurality opinion in *Tilton* v. *Richardson,* 403 U. S. 672 (1971). I disagreed with that reasoning in *Tilton* because, as in this case, that reasoning utterly failed to explain how programs of surveillance and inspection of the kind common to both cases differ from the Pennsylvania and Rhode Island programs invalidated in *Lemon I.* What I said in *Tilton* is equally applicable to the present case:

> "I do not see any significant difference in . . . telling the sectarian university not to teach any nonsecular subjects in a certain building, and Rhode Island's telling the Catholic school teacher [in *Lemon I*] not to teach religion. The vice is the creation through subsidy of a relationship in which the government polices the teaching practices of a religious school or university." 403 U. S., at 660 (separate opinion of BRENNAN, J.).

In any event, *Tilton* is clearly not controlling here. The plurality opinion in *Tilton* was expressly based on the premise, erroneous in my view, that the Federal Higher Education Facilities Act contained no significant

intrusions into the everyday affairs of sectarian educational institutions. Thus, it was said in the plurality opinion:

> "[U]nlike the direct and continuing payments under the Pennsylvania program [in *Lemon I*], and all the incidents of regulation and surveillance, the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." 403 U. S., at 688.

But under the South Carolina scheme, "continuing financial relationships or dependencies," "annual audits," "government analysis," and "regulation and surveillance" are the core features of the arrangement. In short, the South Carolina statutory scheme as applied to this sectarian institution presents the very sort of "intimate continuing relationship or dependency between government and religiously affiliated institutions" that in the plurality's view was lacking in *Tilton*. *Ibid.*

Nor is the South Carolina arrangement between the State and this College any less offensive to the Constitution because it involves, as the Court asserts, no direct financial support to the College by the State. The Establishment Clause forbids far more than payment of public funds directly to support sectarian institutions. It forbids any official involvement with religion, whatever its form, which tends to foster or discourage religious worship or belief. The cases are many in which we have struck down on establishment grounds state laws that provided, not direct financial support to religious institutions, but various other forms of assistance. *McCollum* v. *Board of Education*, 333 U. S. 203 (1948) ("release time" program); *Engel* v. *Vitale*, 370 U. S. 421 (1962)

(prayer reading in public schools); *Abington School District* v. *Schempp*, 374 U. S. 203 (1963) (Bible reading in public schools). Moreover, any suggestion that the constitutionality of a statutory program to aid sectarian institutions is dependent on whether that aid can be characterized as direct or indirect is flatly refuted by the Court's decisions today in *Committee for Public Education & Religious Liberty* v. *Nyquist*, *post*, p. 756, and *Sloan* v. *Lemon*, *post*, p. 825. In those cases, we went behind the mere assertion that tuition reimbursement and tax exemption programs provided no direct aid to sectarian schools and concluded that the "substantive impact" of such programs was essentially the same as a direct subsidy from the State.

The South Carolina arrangement has the identical constitutional infirmities. The State forthrightly aids the College by permitting the College to avail itself of the State's unique ability to borrow money at low interest rates, and the College, in turn, surrenders to the State a comprehensive and continuing surveillance of the educational, religious, and fiscal affairs of the College. The conclusion is compelled that this involves the State in the "essentially religious activities of religious institutions" and "employ[s] the organs of government for essentially religious purposes." I therefore dissent and would reverse the judgment of the Supreme Court of South Carolina.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. *v.* NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 72–694. Argued April 16, 1973—Decided June 25, 1973*

Amendments to New York's Education and Tax Laws established three financial aid programs for nonpublic elementary and secondary schools. The first section provides for direct money grants to "qualifying" nonpublic schools to be used for "maintenance and repair" of facilities and equipment to ensure the students' "health, welfare and safety." A "qualifying" school is a nonpublic, nonprofit elementary or secondary school serving a high concentration of pupils from low-income families. The annual grant is $30 per pupil, or $40 if the facilities are more than 25 years old, which may not exceed 50% of the average per-pupil cost for equivalent services in the public schools. Legislative findings concluded that the State "has a primary responsibility to ensure the health, welfare and safety of children attending . . . nonpublic schools"; that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children" in low-income urban areas; and that "a healthy and safe school environment" contributes "to the stability of urban neighborhoods." Section 2 establishes a tuition reimbursement plan for parents of children attending nonpublic elementary or secondary schools. To qualify, a parent's annual taxable income must be less than $5,000. The amount of reimbursement is $50 per grade school child and $100 per high school student so long as those amounts do not exceed 50% of actual tuition paid. The legisla-

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*Together with No. 72–753, *Anderson* v. *Committee for Public Education & Religious Liberty et al.*; No. 72–791, *Nyquist, Commissioner of Education of New York, et al.* v. *Committee for Public Education & Religious Liberty et al.*; and No. 72–929, *Cherry et al.* v. *Committee for Public Education & Religious Liberty et al.*, also on appeal from the same court.

ture found that the right to select among alternative educational systems should be available in a pluralistic society, and that any sharp decline in nonpublic school pupils would massively increase public school enrollment and costs, seriously jeopardizing quality education for all children. Reiterating a declaration contained in the first section, the findings concluded that "such assistance is clearly secular, neutral and nonideological." The third program, contained in §§ 3, 4, and 5 of the challenged law, is designed to give tax relief to parents failing to qualify for tuition reimbursement. Each eligible taxpayer-parent is entitled to deduct a stipulated sum from his adjusted gross income for each child attending a nonpublic school. The amount of the deduction is unrelated to the amount of tuition actually paid and decreases as the amount of taxable income increases. These sections are also prefaced by a series of legislative findings similar to those accompanying the previous sections. Almost 20% of the State's students, some 700,000 to 800,000, attend nonpublic schools, approximately 85% of which are church affiliated. While practically all the schools entitled to receive maintenance and repair grants "are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree," institutions qualifying under the remainder of the statute include a substantial number of other church-affiliated schools. The District Court held that § 1, the maintenance and repair grants, and § 2, the tuition reimbursement grants, were invalid, but that the income tax provisions of §§ 3, 4, and 5 did not violate the Establishment Clause. *Held:*

1. The propriety of a legislature's purpose may not immunize from further scrutiny a law that either has a primary effect that advances religion or fosters excessive church-state entanglements. Pp. 772–774.

2. The maintenance and repair provisions of the New York statute violate the Establishment Clause because their inevitable effect is to subsidize and advance the religious mission of sectarian schools. Those provisions do not properly guarantee the secularity of state aid by limiting the percentage of assistance to 50% of comparable aid to public schools. Such statistical assurances fail to provide an adequate guarantee that aid will not be utilized to advance the religious activities of sectarian schools. Pp. 774–780.

3. The tuition reimbursement grants, if given directly to sectarian schools, would similarly violate the Establishment Clause, and the fact that they are delivered to the parents rather than the schools does not compel a contrary result, as the effect of the aid

is unmistakably to provide financial support for nonpublic, sectarian institutions. Pp. 780–789.

(a) The fact that the grant is given as reimbursement for tuition already paid, and that the recipient is not required to spend the amount received on education, does not alter the effect of the law. Pp. 785–787.

(b) The argument that the statute provides "a statistical guarantee of neutrality" since the tuition reimbursement is only 15% of the educational costs in nonpublic schools and the compulsory education laws require more than 15% of school time to be devoted to secular courses, is merely another variant of the argument rejected as to maintenance and repair costs. Pp. 787–788.

(c) The State must maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion, and it cannot, by designing a program to promote the free exercise of religion, erode the limitations of the Establishment Clause. Pp. 788–789.

4. The system of providing income tax benefits to parents of children attending New York's nonpublic schools also violates the Establishment Clause because, like the tuition reimbursement program, it is not sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools. *Walz* v. *Tax Comm'n*, 397 U. S. 664, distinguished. Pp. 789–794.

5. Because the challenged sections have the impermissible effect of advancing religion, it is not necessary to consider whether such aid would yield an entanglement with religion. But it should be noted that, apart from any administrative entanglement of the State in particular religious programs, assistance of the sort involved here carries grave potential for entanglement in the broader sense of continuing and expanding political strife over aid to religion. Pp. 794–798.

350 F. Supp. 655, affirmed in part and reversed in part.

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed an opinion concurring in Part II–A of the Court's opinion, in which REHNQUIST, J., joined, and dissenting from Parts II–B and II–C, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 798. REHNQUIST, J., filed an opinion dissenting in part, in which BURGER, C. J., and WHITE, J., joined, *post*, p. 805. WHITE, J., filed a dissenting opinion, in those portions of which

relating to Parts II–B and II–C of the Court's opinion BURGER, C. J., and REHNQUIST, J., joined, *post*, p. 813.

Leo Pfeffer argued the cause for appellants in No. 72–694 and for appellees in Nos. 72–753, 72–791, and 72–929. With him on the brief were *Melvin L. Wulf* and *Burt Neuborne*. *Jean M. Coon*, Assistant Solicitor General of New York, argued the cause for Nyquist et al., appellees in No. 72–694 and appellants in No. 72–791. With her on the brief were *Louis J. Lefkowitz*, Attorney General, and *Ruth Kessler Toch*, Solicitor General. *Porter R. Chandler* argued the cause for appellants in No. 72–929 and for appellees Boylan et al. in No. 72–694. With him on the brief was *Richard E. Nolan*. *John F. Haggerty* argued the cause for appellant in No. 72–753. With him on the brief was *Louis P. Contiguglia*.†

MR. JUSTICE POWELL delivered the opinion of the Court.

These cases raise a challenge under the Establishment Clause of the First Amendment to the constitutionality of a recently enacted New York law which provides financial assistance, in several ways, to nonpublic elementary and secondary schools in that State. The cases involve an intertwining of societal and constitutional issues of the greatest importance.

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†Briefs of *amici curiae* in No. 72–694 were filed by *Solicitor General Griswold, Assistant Attorney General Wood, Harriet S. Shapiro, Walter H. Fleischer*, and *Thomas G. Wilson* for the United States; by *Stephen J. Pollak, Benjamin W. Boley, John D. Aldock* and *David Rubin* for the National Education Association et al.; and by *Joseph B. Friedman* for the Baptist Joint Committee on Public Affairs. Briefs of *amici curiae* in all four cases were filed by *Henry C. Clausen* for United Americans for Public Schools; by *Nathan Lewin* and *Julius Berman* for the National Jewish Commission on Law and Public Affairs; by *Victor A. Sachse* and *Robert P. Breazeale* for Sidney A. Seegers et al.; and by *Don H. Reuben* and *Lawrence Gunnels* for Lawrence E. Klinger.

James Madison, in his Memorial and Remonstrance Against Religious Assessments,[1] admonished that a "prudent jealousy" for religious freedoms required that they never become "entangled . . . in precedents." [2] His strongly held convictions, coupled with those of Thomas Jefferson and others among the Founders, are reflected in the first Clauses of the First Amendment of the Bill of Rights, which state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." [3] Yet, despite Madison's admonition and the "sweep of the absolute prohibitions" of the Clauses,[4] this Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court. Those cases have occasioned thorough and

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[1] Madison's Memorial and Remonstrance was the catalytic force occasioning the defeat in Virginia of an Assessment Bill designed to extract taxes in support of teachers of the Christian religion. See n. 28, *infra*. See also *Everson* v. *Board of Education*, 330 U. S. 1, 28, 33–41 (1947) (Rutledge, J., dissenting).

[2] Madison's often-quoted declaration is reprinted as an appendix to the dissenting opinions of Mr. Justice Rutledge and MR. JUSTICE DOUGLAS in *Everson* v. *Board of Education*, *supra*, at 63, 65, and *Walz* v. *Tax Comm'n*, 397 U. S. 664, 700, 719, 721 (1970), respectively.

[3] The provisions of the First Amendment have been made binding on the States through the Due Process Clause of the Fourteenth Amendment. See, *e. g.*, *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

[4] *Walz* v. *Tax Comm'n*, *supra*, at 668. MR. CHIEF JUSTICE BURGER, writing for the Court, noted that the purpose of the Clauses "was to state an objective, not to write a statute," and that "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Id.*, at 668–669.

thoughtful scholarship by several of this Court's most respected former Justices, including Justices Black, Frankfurter, Harlan, Jackson, Rutledge, and Chief Justice Warren.

As a result of these decisions and opinions, it may no longer be said that the Religion Clauses are free of "entangling" precedents. Neither, however, may it be said that Jefferson's metaphoric "wall of separation" between Church and State has become "as winding as the famous serpentine wall" he designed for the University of Virginia. *McCollum* v. *Board of Education*, 333 U. S. 203, 238 (1948) (Jackson, J., concurring). Indeed, the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined. Our task, therefore, is to assess New York's several forms of aid in the light of principles already delineated.[5]

I

In May 1972, the Governor of New York signed into law several amendments to the State's Education and Tax Laws. The first five sections of these amendments established three distinct financial aid programs for non-

[5] The existence, at this stage of the Court's history, of guiding principles etched over the years in difficult cases does not, however, make our task today an easy one. For it is evident from the numerous opinions of the Court, and of Justices in concurrence and dissent in the leading cases applying the Establishment Clause, that no "bright line" guidance is afforded. Instead, while there has been general agreement upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to perceive with invariable clarity the "lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971). And, at least where questions of entanglements are involved, the Court has acknowledged that, as of necessity, the "wall" is not without bends and may constitute a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.*, at 614.

public elementary and secondary schools. Almost immediately after the signing of these measures a complaint was filed in the United States District Court for the Southern District of New York challenging each of the three forms of aid as violative of the Establishment Clause. The plaintiffs were an unincorporated association, known as the Committee for Public Education and Religious Liberty (PEARL), and several individuals who were residents and taxpayers in New York, some of whom had children attending public schools. Named as defendants were the State Commissioner of Education, the Comptroller, and the Commissioner of Taxation and Finance. Motions to intervene on behalf of defendants were granted to a group of parents with children enrolled in nonpublic schools, and to the Majority Leader and President pro tem of the New York State Senate.[6] By consent of the parties, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2283, and the case was decided without an evidentiary hearing. Because the questions before the District Court were resolved on the basis of the pleadings, that court's decision turned on the constitutionality of each provision on its face.

The first section of the challenged enactment, entitled "Health and Safety Grants for Nonpublic School Children," [7] provides for direct money grants from the State to "qualifying" nonpublic schools to be used for the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils." [8] A "qualifying" school is any non-

[6] The motion was granted in favor of Mr. Earl W. Brydges. Upon his retirement in December 1972, his successor, Mr. Warren M. Anderson, was substituted.

[7] N. Y. Laws 1972, c. 414, § 1, amending N. Y. Educ. Law, Art. 12, §§ 549–553 (Supp. 1972–1973).

[8] *Id.*, § 550 (5).

public, nonprofit elementary or secondary school which "has been designated during the [immediately preceding] year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U. S. C. A. § 425)." [9] Such schools are entitled to receive a grant of $30 per pupil per year, or $40 per pupil per year if the facilities are more than 25 years old. Each school is required to submit to the Commissioner of Education an audited statement of its expenditures for maintenance and repair during the preceding year, and its grant may not exceed the total of such expenses. The Commissioner is also required to ascertain the average per-pupil cost for equivalent maintenance and repair services in the public schools, and in no event may the grant to nonpublic qualifying schools exceed 50% of that figure.

"Maintenance and repair" is defined by the statute to include "the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils." [10] This section is prefaced by a series of legislative findings which shed light on the State's purpose in enacting the law. These findings conclude that the State "has a primary responsibility to ensure the health, welfare and safety of children attending . . . nonpublic schools"; that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children"

[9] *Id.*, § 550 (2).
[10] *Id.*, § 550 (6).

in low-income urban areas; and that "a healthy and safe school environment" contributes "to the stability of urban neighborhoods." For these reasons, the statute declares that "the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature." [11]

The remainder of the challenged legislation—§§ 2 through 5—is a single package captioned the "Elementary and Secondary Education Opportunity Program." It is composed, essentially, of two parts, a tuition grant program and a tax benefit program. Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools.[12] To qualify under this section a parent must have an annual taxable income of less than $5,000. The amount of reimbursement is limited to $50 for each grade school child and $100 for each high school child. Each parent is required, however, to submit to the Commissioner of Education a verified statement containing a receipted tuition bill, and the amount of state reimbursement may not exceed 50% of that figure. No restrictions are imposed on the use of the funds by the reimbursed parents.

This section, like § 1, is prefaced by a series of legislative findings designed to explain the impetus for the State's action. Expressing a dedication to the "vitality of our pluralistic society," the findings state that a "healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences." [13] The findings further emphasize that the

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[11] *Id.*, § 549.

[12] N. Y. Laws 1972, c. 414, § 2, amending N. Y. Educ. Law, Art. 12–A, §§ 559–563 (Supp. 1972–1973).

[13] *Id.*, § 559 (1).

right to select among alternative educational systems "is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated." [14] Turning to the public schools, the findings state that any "precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs," an increase that would "aggravate an already serious fiscal crisis in public education" and would "seriously jeopardize quality education for all children." [15] Based on these premises, the statute asserts the State's right to relieve the financial burden of parents who send their children to nonpublic schools through this tuition reimbursement program. Repeating the declaration contained in § 1, the findings conclude that "[s]uch assistance is clearly secular, neutral and nonideological." [16]

The remainder of the "Elementary and Secondary Education Opportunity Program," contained in §§ 3, 4, and 5 of the challenged law,[17] is designed to provide a form of tax relief to those who fail to qualify for tuition reimbursement. Under these sections parents may subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they have paid at least $50 in nonpublic school tuition. If the taxpayer's adjusted gross income is less than $9,000 he may subtract $1,000 for each of as many as three dependents. As the taxpayer's income rises, the amount he may subtract diminishes. Thus, if a taxpayer has adjusted gross income of $15,000, he may subtract only $400 per dependent, and if his adjusted gross income is

[14] *Id.*, § 559 (2).

[15] *Id.*, § 559 (3).

[16] *Id.*, § 559 (4).

[17] N. Y. Laws 1972, c. 414, §§ 3, 4, and 5, amending N. Y. Tax Law §§ 612 (c), 612 (j) (Supp. 1972–1973).

$25,000 or more, no deduction is allowed.[18] The amount of the deduction is not dependent upon how much the taxpayer actually paid for nonpublic school tuition, and is given in addition to any deductions to which the taxpayer may be entitled for other religious or charitable contributions. As indicated in the memorandum from the Majority Leader and President pro tem of the Senate, submitted to each New York legislator during consideration of the bill, the actual tax benefits under these provisions were carefully calculated in advance.[19] Thus, comparable tax

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[18] Section 5 contains the following table:

If New York adjusted gross income is:	The amount allowable for each dependent is:
Less than $9,000	$1,000
9,000–10,999	850
11,000–12,999	700
13,000–14,999	550
15,000–16,999	400
17,000–18,999	250
19,000–20,999	150
21,000–22,999	125
23,000–24,999	100
25,000 and over	—0—

N. Y. Tax Law § 612 (j)(1) (Supp. 1972–1973).

[19] The following computations were submitted by Senator Brydges:

If Adjusted Gross Income is	Estimated Net Benefit to Family		
	One child	Two children	Three or more
less than $9,000	$50.00	$100.00	$150.00
9,000–10,999	42.50	85.00	127.50
11,000–12,999	42.00	84.00	126.00
13,000–14,999	38.50	77.00	115.50
15,000–16,999	32.00	64.00	96.00
17,000–18,999	22.50	45.00	67.50
19,000–20,999	15.00	30.00	45.00
21,000–22,999	13.75	27.50	41.25
23,000–24,999	12.00	24.00	36.00
25,000 and over	0	0	0

benefits pick up at approximately the point at which tuition reimbursement benefits leave off.

While the scheme of the enactment indicates that the purposes underlying the promulgation of the tuition reimbursement program should be regarded as pertinent as well to these tax law sections, § 3 does contain an additional series of legislative findings. Those findings may be summarized as follows: (i) contributions to religious, charitable and educational institutions are already deductible from gross income; (ii) nonpublic educational institutions are accorded tax exempt status; (iii) such institutions provide education for children attending them and also serve to relieve the public school systems of the burden of providing for their education; and, therefore, (iv) the "legislature . . . finds and determines that similar modifications . . . should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents." [20]

Although no record was developed in these cases, a number of pertinent generalizations may be made about the nonpublic schools which would benefit from these enactments. The District Court, relying on findings in a similar case recently decided by the same court,[21] adopted a profile of these sectarian, nonpublic schools similar to the one suggested in the plaintiffs' complaint. Qualifying institutions, under all three segments of the enactment, could be ones that

> "(a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doc-

[20] N. Y. Tax Law § 612 (Supp. 1972–1973) (accompanying notes).

[21] *Committee for Public Education & Religious Liberty* v. *Levitt*, 342 F. Supp. 439, 440–441 (SDNY 1972), aff'd, *ante*, p. 472.

> trine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach." 350 F. Supp. 655, 663.

Of course, the characteristics of individual schools may vary widely from that profile. Some 700,000 to 800,000 students, constituting almost 20% of the State's entire elementary and secondary school population, attend over 2,000 nonpublic schools, approximately 85% of which are church affiliated. And while "all or practically all" of the 280 schools [22] entitled to receive "maintenance and repair" grants "are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree," *id.*, at 661, institutions qualifying under the remainder of the statute include a substantial number of Jewish, Lutheran, Episcopal, Seventh Day Adventist, and other church-affiliated schools.[23]

Plaintiffs argued below that because of the substantially religious character of the intended beneficiaries, each of the State's three enactments offended the Establishment Clause. The District Court, in an opinion carefully canvassing this Court's recent precedents, held

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[22] As indicated in the District Court's opinion, it has been estimated that 280 schools would qualify for such grants. The relevant criteria for determining eligibility are set out in 20 U. S. C. § 425, and the central test is whether the school is one "in which there is a high concentration of students from low-income families."

[23] In the fall of 1968, there were 2,038 nonpublic schools in New York State; 1,415 Roman Catholic; 164 Jewish; 59 Lutheran; 49 Episcopal; 37 Seventh Day Adventist; 18 other church affiliated; 296 without religious affiliation. N. Y. State Educ. Dept., Financial Support—Nonpublic Schools 3 (1969).

unanimously that § 1 (maintenance and repair grants) and § 2 (tuition reimbursement grants) were invalid. As to the income tax provisions of §§ 3, 4, and 5, however, a majority of the District Court, over the dissent of Circuit Judge Hays, held that the Establishment Clause had not been violated. Finding the provisions of the law severable, it enjoined permanently any further implementation of §§ 1 and 2 but declared the remainder of the law independently enforceable. The plaintiffs (hereinafter appellants) appealed directly to this Court, challenging the District Court's adverse decision as to the third segment of the statute.[24] The defendant state officials (hereinafter appellees) have appealed so much of the court's decision as invalidates the first and second portions of the 1972 law,[25] the intervenor Majority Leader and President pro tem of the Senate (hereinafter appellee or intervenor) has also appealed from those aspects of the lower court's opinion,[26] and the intervening parents of nonpublic schoolchildren (hereinafter appellee or intervenor) have appealed only from the decision as to § 2.[27] This Court noted probable jurisdiction over each appeal and ordered the cases consolidated for oral argument. 410 U. S. 907 (1973). Thus, the constitutionality of each of New York's recently promulgated aid provisions is squarely before us. We affirm the District Court insofar as it struck down §§ 1 and 2 and reverse its determination regarding §§ 3, 4, and 5.

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[24] No. 72–694, *Committee for Public Education & Religious Liberty* v. *Nyquist.*

[25] No. 72–791, *Nyquist* v. *Committee for Public Education & Religious Liberty.*

[26] No. 72–753, *Anderson* v. *Committee for Public Education & Religious Liberty.*

[27] No. 72–929, *Cherry* v. *Committee for Public Education & Religious Liberty.*

II

The history of the Establishment Clause has been recounted frequently and need not be repeated here. See *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *id.*, at 28 (Rutledge, J., dissenting); [28] *McCollum* v. *Board*

[28] Virginia's experience, examined at length in the majority and dissenting opinions in *Everson*, constitutes one of the greatest chapters in the history of this country's adoption of the essentially revolutionary notion of separation between Church and State. During the Colonial Era and into the late 1700's, the Anglican Church appeared firmly seated as the established church of Virginia. But in 1776, assisted by the persistent efforts of Baptists, Presbyterians, and Lutherans, the Virginia Convention approved a provision for its first constitution's Bill of Rights calling for the free exercise of religion. The provision, drafted by George Mason and substantially amended by James Madison, stated "[t]hat religion . . . and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion according to the dictates of conscience . . . ."

But the Virginia Bill of Rights contained no prohibition against the Establishment of Religion, and the next eight years were marked by debate over the relationship between Church and State. In 1784, a bill sponsored principally by Patrick Henry, entitled A Bill Establishing a Provision for Teachers of the Christian Religion, was brought before the Virginia Assembly. The Bill, reprinted in full as an Appendix to Mr. Justice Rutledge's dissenting opinion in *Everson* v. *Board of Education*, 330 U. S. 1, 72–74 (1947), required all persons to pay an annual tax "for the support of Christian teachers" in order that the teaching of religion might be promoted. Each taxpayer was permitted under the Bill to declare which church he desired to receive his share of the tax. The Bill was not voted on during the 1784 session, and prior to the convening of the 1785 session Madison penned his Memorial and Remonstrance against Religious Assessments, outlining in 15 numbered paragraphs the reasons for his opposition to the Assessments Bill. The document was widely circulated and inspired such overwhelming opposition to the Bill that it died during the ensuing session without reaching a vote. Madison's Memorial and Remonstrance, recognized today as

of Education, 333 U. S., at 212 (separate opinion of Frankfurter, J.); *McGowan* v. *Maryland,* 366 U. S. 420 (1961); *Engel* v. *Vitale,* 370 U. S. 421 (1962). It is enough to note that it is now firmly established that a law may be one "respecting an establishment of religion" even though its consequence is not to promote a "state religion," *Lemon* v. *Kurtzman,* 403 U. S. 602, 612 (1971), and even though it does not aid one religion more than another but merely benefits all religions alike. *Everson* v. *Board of Education, supra,* at 15. It is equally well established, however, that not every law that confers an "indirect," "remote," or "incidental" benefit upon religious institutions is, for that reason alone, constitutionally invalid. *Everson, supra; McGowan* v. *Maryland,*

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one of the cornerstones of the First Amendment's guarantee of government neutrality toward religion, also provided the necessary foundation for the immediate consideration and adoption of Thomas Jefferson's Bill for Establishing Religious Freedom, which contained Virginia's first acknowledgment of the principle of total separation of Church and State. The core of that principle, as stated in the Bill, is that "no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . ." In Jefferson's perspective, so vital was this "wall of separation" to the perpetuation of democratic institutions that it was this Bill, along with his authorship of the Declaration of Independence and the founding of the University of Virginia, that he wished to have inscribed on his tombstone. Report of the Comm'n on Constitutional Revision, The Constitution of Virginia 100–101 (1969).

Both Madison's Bill of Rights provision on the free exercise of religion and Jefferson's Bill for Establishing Religious Freedom have remained in the Virginia Constitution, unaltered in substance, throughout that State's history. See Va. Const., Art. I, § 16, in which the two guarantees have been brought together in a single provision. For comprehensive discussions of the pertinent Virginia history, see S. Cobb, The Rise of Religious Liberty in America 74–115, 490–499 (reprinted 1970); C. James, The Struggle for Religious Liberty in Virginia (1900); I. Brant, James Madison The Nationalist 1780–1787, pp. 343–355 (1948).

supra, at 450; *Walz* v. *Tax Comm'n*, 397 U. S. 664, 671–672, 674–675 (1970). What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects. Primary among those evils have been "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Comm'n*, *supra*, at 668; *Lemon* v. *Kurtzman*, *supra*, at 612.

Most of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education. Among these religion-education precedents, two general categories of cases may be identified: those dealing with religious activities within the public schools,[29] and those involving public aid in varying forms to sectarian educational institutions.[30] While the New York legislation places this case in the latter category, its resolution requires consideration not only of the several aid-to-sectarian-education cases, but also of our other education precedents and of several important noneducation cases. For the now well-defined three-part test that has emerged from our decisions is a product of considerations derived from the full sweep of the Establishment Clause cases. Taken together,

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[29] *McCollum* v. *Board of Education*, 333 U. S. 203 (1948) ("release time" from public education for religious education); *Zorach* v. *Clauson*, 343 U. S. 306 (1952) (also a "release time" case); *Engel* v. *Vitale*, 370 U. S. 421 (1962) (prayer reading in public schools); *School District of Abington Township* v. *Schempp*, 374 U. S. 203 (1963) (Bible reading in public schools); *Epperson* v. *Arkansas*, 393 U. S. 97 (1968) (anti-evolutionary limitation on public school study).

[30] *Everson* v. *Board of Education*, *supra* (bus transportation); *Board of Education* v. *Allen*, 392 U. S. 236 (1968) (textbooks); *Lemon* v. *Kurtzman*, *supra* (teachers' salaries, textbooks, instructional materials); *Earley* v. *DiCenso*, 403 U. S. 602 (1971) (teachers' salaries); *Tilton* v. *Richardson*, 403 U. S. 672 (1971) (secular college facilities).

these decisions dictate that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, *e. g., Epperson* v. *Arkansas,* 393 U. S. 97 (1968), second, must have a primary effect that neither advances nor inhibits religion, *e. g., McGowan* v. *Maryland, supra; School District of Abington Township* v. *Schempp,* 374 U. S. 203 (1963), and, third, must avoid excessive government entanglement with religion, *e. g., Walz* v. *Tax Comm'n, supra.* See *Lemon* v. *Kurtzman, supra,* at 612–613; *Tilton* v. *Richardson,* 403 U. S. 672, 678 (1971).[31]

In applying these criteria to the three distinct forms of aid involved in this case, we need touch only briefly on the requirement of a "secular legislative purpose." As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its schoolchildren. And we do not doubt—indeed, we fully recognize—the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.

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[31] In discussing the application of these "tests," MR. CHIEF JUSTICE BURGER noted in *Tilton* v. *Richardson, supra,* that "there is no single constitutional caliper that can be used to measure the precise degree" to which any one of them is applicable to the state action under scrutiny. Rather, these tests or criteria should be "viewed as guidelines" within which to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause." *Id.,* at 677–678.

But the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State. Accordingly, we must weigh each of the three aid provisions challenged here against these criteria of effect and entanglement.

A

The "maintenance and repair" provisions of § 1 authorize direct payments to nonpublic schools, virtually all of which are Roman Catholic schools in low-income areas. The grants, totaling $30 or $40 per pupil depending on the age of the institution, are given largely without restriction on usage. So long as expenditures do not exceed 50% of comparable expenses in the public school system, it is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from state tax-raised funds. No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

The state officials nevertheless argue that these expenditures for "maintenance and repair" are similar to other financial expenditures approved by this Court.

Primarily they rely on *Everson* v. *Board of Education, supra; Board of Education* v. *Allen,* 392 U. S. 236 (1968); and *Tilton* v. *Richardson, supra.* In each of those cases it is true that the Court approved a form of financial assistance which conferred undeniable benefits upon private, sectarian schools. But a close examination of those cases illuminates their distinguishing characteristics. In *Everson,* the Court, in a five-to-four decision, approved a program of reimbursements to parents of public as well as parochial schoolchildren for bus fares paid in connection with transportation to and from school, a program which the Court characterized as approaching the "verge" of impermissible state aid. 330 U. S., at 16. In *Allen,* decided some 20 years later, the Court upheld a New York law authorizing the provision of *secular* textbooks for all children in grades seven through 12 attending public and nonpublic schools. Finally, in *Tilton,* the Court upheld federal grants of funds for the construction of facilities to be used for clearly *secular* purposes by public and nonpublic institutions of higher learning.

These cases simply recognize that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course, it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law. In *McGowan* v. *Maryland,*

supra, Sunday Closing Laws were sustained even though one of their undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services. Also, in *Walz* v. *Tax Comm'n, supra,* property tax exemptions for church property were held not violative of the Establishment Clause despite the fact that such exemptions relieved churches of a financial burden.

Tilton draws the line most clearly. While a bare majority was there persuaded, for the reasons stated in the plurality opinion and in MR. JUSTICE WHITE'S concurrence, that carefully limited construction grants to colleges and universities could be sustained, the Court was unanimous in its rejection of one clause of the federal statute in question. Under that clause, the Government was entitled to recover a portion of its grant to a sectarian institution in the event that the constructed facility was used to advance religion by, for instance, converting the building to a chapel or otherwise allowing it to be "used to promote religious interests." 403 U. S., at 683. But because the statute provided that the condition would expire at the end of 20 years, the facilities would thereafter be available for use by the institution for any sectarian purpose. In striking down this provision, the plurality opinion emphasized that "[l]imiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period." *Ibid.* And in that event, "the original federal grant will in part have the effect of advancing religion." *Ibid.* See also *id.,* at 692 (DOUGLAS, J., dissenting in part), 659–661 (separate opinion of BRENNAN, J.), 665 n. 1 (WHITE, J., concurring in judgment). If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, *a fortiori* they

may not be distributed to elementary and secondary sectarian schools [32] for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.[33]

It might be argued, however, that while the New York "maintenance and repair" grants lack specifically articulated secular restrictions, the statute does provide a sort of statistical guarantee of separation by limiting grants to 50% of the amount expended for comparable services in the public schools. The legislature's supposition might have been that at least 50% of the ordinary public school maintenance and repair budget would be devoted to purely secular facility upkeep in sectarian schools. The shortest answer to this argument is that the statute itself allows, as a ceiling, grants satisfying the entire "amount of expenditures for maintenance and repair of such school" providing only that it is neither more than $30 or $40 per pupil nor more than 50% of the comparable

[32] The plurality in *Tilton* was careful to point out that there are "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." 403 U. S., at 685. See *Hunt* v. *McNair*, *ante*, p. 734.

[33] Our Establishment Clause precedents have recognized the special relevance in this area of Mr. Justice Holmes' comment that "a page of history is worth a volume of logic." See *Walz* v. *Tax Comm'n*, 397 U. S., at 675–676 (citing *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921)). In *Everson*, Mr. Justice Black surveyed the history of state involvement in, and support of, religion during the pre-Revolutionary period and concluded:

"These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and *maintain* churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment." 330 U. S., at 11 (emphasis supplied).

public school expenditures.[34] Quite apart from the language of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. In *Earley* v. *DiCenso*, a companion case to *Lemon* v. *Kurtzman*, *supra*, the Court struck down a Rhode Island law authorizing salary supplements to teachers of secular subjects. The grants were not to exceed 15% of any teacher's annual salary. Although the law was invalidated on entanglement grounds, the Court made clear that the State could not have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating "their religious beliefs from their secular educational responsibilities." 403 U. S., at 619.

> "The Rhode Island Legislature has not, *and could not*, provide state aid on the basis of a mere assumption that secular teachers under religious discipline

[34] The pertinent section reads as follows:

"In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. *In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.*" N. Y. Educ. Law, Art. 12, § 551 (Supp. 1972–1973) (emphasis supplied).

> can avoid conflicts. The State *must be certain, given the Religion Clauses,* that subsidized teachers do not inculcate religion . . . ." *Ibid.*[35] (Emphasis supplied.)

Nor could the State of Rhode Island have prevailed by simply relying on the assumption that, whatever a secular teacher's inabilities to refrain from mixing the religious with the secular, he would surely devote at least 15% of his efforts to purely secular education, thus exhausting the state grant. It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny. See also *Tilton* v. *Richardson, supra.*[36]

What we have said demonstrates that New York's maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian

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[35] Elsewhere in the opinion, the Court emphasized the necessity for the States of Rhode Island and Pennsylvania to assure, through careful regulation, the secularity of their grants:

"The two legislatures . . . have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses." 403 U. S., at 613.

[36] In *Tilton,* federal construction grants were limited to paying 50% of the cost of erecting any secular facility. In striking from the law the 20-year limitation, the Court was concerned lest *any* federally financed facility be used for religious purposes *at any time.* It was plainly not concerned only that at least 50% of the facility, or 50% of its life, be devoted to secular activities. Had this been the test there can be little doubt that the 20-year restriction would have been adequate.

schools. We have no occasion, therefore, to consider the further question whether those provisions as presently written would also fail to survive scrutiny under the administrative entanglement aspect of the three-part test because assuring the secular use of all funds requires too intrusive and continuing a relationship between Church and State, *Lemon* v. *Kurtzman, supra.*

B

New York's tuition reimbursement program also fails the "effect" test, for much the same reasons that govern its maintenance and repair grants. The state program is designed to allow direct, unrestricted grants of $50 to $100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low-income brackets who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation. To qualify, a parent must have earned less than $5,000 in taxable income and must present a receipted tuition bill from a nonpublic school.

There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools, since they would suffer from the same deficiency that renders invalid the grants for maintenance and repair. In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid. As Mr. Justice Black put it quite simply in *Everson:*

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U. S., at 16.

The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on *Everson* and *Allen* for their claim that grants to parents, unlike grants to institutions, respect the "wall of separation" required by the Constitution.[37] It is true that in those cases the Court upheld laws that provided benefits to children attending religious schools and to their parents: As noted above, in *Everson* parents were reimbursed for bus fares paid to send children to parochial schools, and in *Allen* textbooks were loaned directly to the children. But those decisions make clear that, far from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.

In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. 330 U. S., at 17–18. Such services,

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[37] In addition to *Everson* and *Allen*, THE CHIEF JUSTICE in his dissenting opinion relies on *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908), for the proposition that "government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions." *Post*, at 801. *Quick Bear*, however, did not involve the expenditure of tax-raised moneys to support sectarian schools. The funds that were utilized by the Indians to provide sectarian education were treaty and trust funds which the Court emphasized belonged to the Indians as payment for the cession of Indian land and other rights. 210 U. S., at 80–81. It was their money, and the Court held that for Congress to have prohibited them from expending their own money to acquire a religious education would have constituted a prohibition of the free exercise of religion. *Id.*, at 82. The present litigation is quite unlike *Quick Bear* since that case did not involve the distribution of public funds, directly or indirectly, to compensate parents who send their children to religious schools.

provided in common to all citizens, are "so separate and so indisputably marked off from the religious function," *id.*, at 18, that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses. "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of [the law under consideration] does not authorize the loan of religious books, and the State claims no right to distribute religious literature. . . . Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law." 392 U. S., at 244–245.[38]

[38] *Allen* and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools. See also *Tilton* v. *Richardson*, *supra*, in which federal aid was made available to *all* institutions of higher learning, and *Walz* v. *Tax Comm'n*, *supra*, in which tax exemptions were accorded to *all* educational and charitable nonprofit institutions. We do not agree with the suggestion in the dissent of THE CHIEF JUSTICE that tuition grants are an analogous endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools. *Post*, at 801–803. The grants to parents of private school children are given in addition to the right that they have to send their children to public schools "totally at state expense." And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause.

Because of the manner in which we have resolved the tuition grant

The tuition grants here are subject to no such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." *Lemon* v. *Kurtzman, supra,* at 613. Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.[39]

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issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (*e. g.,* scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See *Wolman* v. *Essex,* 342 F. Supp. 399, 412–413 (SD Ohio), aff'd, 409 U. S. 808 (1972). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the "G. I. Bill," 38 U. S. C. § 1651, impermissibly advance religion in violation of the Establishment Clause. See also n. 32, *supra.*

[39] Appellees, focusing on the term "principal or primary effect" which this Court has utilized in expressing the second prong of the three-part test, *e. g., Lemon* v. *Kurtzman, supra,* at 612, have argued that the Court must decide in these cases whether the "primary" effect of New York's tuition grant program is to subsidize religion or to promote these legitimate secular objectives. MR. JUSTICE WHITE's dissenting opinion, *post,* at 823, similarly suggests that the Court today fails to make this "ultimate judgment." We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have

Mr. Justice Black, dissenting in *Allen*, warned that

"[i]t requires no prophet to foresee that on the argument used to support this law others could be up-

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a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. In *McGowan* v. *Maryland*, 366 U. S. 420 (1961), Sunday Closing Laws were upheld, not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests; instead, approval flowed from the finding, based upon a close examination of the history of such laws, that they had only a remote and incidental effect advantageous to religious institutions. *Id.*, at 450. See also *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617, 630 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582, 598 (1961). Likewise, in *Schempp* the school authorities argued that Bible-reading and other religious recitations in public schools served, primarily, secular purposes, including "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." 374 U. S., at 223. Yet, without discrediting these ends and without determining whether they took precedence over the direct religious benefit, the Court held such exercises incompatible with the Establishment Clause. See also *id.*, at 278–281 (BRENNAN, J., concurring). Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in *Tilton*, in which the plurality found that the mere possibility that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might "*in part* have the effect of advancing religion." 403 U. S., at 683 (emphasis supplied).

It may assist in providing a historical perspective to recall that the argument here is not a new one. The Preamble to Patrick Henry's Bill Establishing a Provision for Teachers of the Christian Religion, which would have required Virginians to pay taxes to support religious teachers and which became the focal point of Madison's Memorial and Remonstrance, see n. 28, *supra*, contained the following listing of secular purposes:

"[T]he general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve

> held providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the Government to pick up all the bills for the religious schools." 392 U. S., at 253.

His fears regarding religious buildings and religious teachers have not come to pass, *Tilton* v. *Richardson, supra; Lemon* v. *Kurtzman, supra,* and insofar as tuition grants constitute a means of "pick[ing] up . . . the bills for the religious schools," neither has his greatest fear materialized. But the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court abundantly support the wisdom of Mr. Justice Black's prophecy.

Although we think it clear, for the reasons above stated, that New York's tuition grant program fares no better under the "effect" test than its maintenance and repair program, in view of the novelty of the question we will address briefly the subsidiary arguments made by the state officials and intervenors in its defense.

First, it has been suggested that it is of controlling significance that New York's program calls for *reimbursement* for tuition already paid rather than for direct contributions which are merely routed through the parents to the schools, in advance of or in lieu of payment

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the peace of society . . . ." *Everson* v. *Board of Education,* 330 U. S., at 72 (Appendix to dissent of Rutledge, J.).

Such secular objectives, no matter how desirable and irrespective of whether judges might possess sufficiently sensitive calipers to ascertain whether the secular effects outweigh the sectarian benefits, cannot serve today any more than they could 200 years ago to justify such a direct and substantial advancement of religion.

by the parents. The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. There is no element of coercion attached to the reimbursement, and no assurance that the money will eventually end up in the hands of religious schools. The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause. In *School District of Abington Township* v. *Schempp, supra,* it was contended that Bible recitations in public schools did not violate the Establishment Clause because participation in such exercises was not coerced. The Court rejected that argument, noting that while proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause. 374 U. S., at 222–223. MR. JUSTICE BRENNAN's concurring views reiterated the Court's conclusion:

> "Thus the short, and to me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims . . . ." *Id.,* at 288.

A similar inquiry governs here: if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions.[40] Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same. In sum, we agree with

[40] The forms of aid involved in *Everson, Earley* v. *DiCenso,* and *Lemon,* were all given as "reimbursement," yet not one line in any of those cases suggests that this factor was of any constitutional significance.

the conclusion of the District Court that "[w]hether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance." 350 F. Supp., at 668.

Second, the Majority Leader and President pro tem of the State Senate argues that it is significant here that the tuition reimbursement grants pay only a portion of the tuition bill, and an even smaller portion of the religious school's total expenses. The New York statute limits reimbursement to 50% of any parent's actual outlay. Additionally, intervenor estimates that only 30% of the total cost of nonpublic education is covered by tuition payments, with the remaining coming from "voluntary contribution, endowments and the like." [41] On the basis of these two statistics, appellees reason that the "maximum tuition reimbursement by the State is thus only 15% of educational costs in the nonpublic schools." [42] And, "since the compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses," the New York statute provides "a statistical guarantee of neutrality." [43] It should readily be seen that this is simply another variant of the argument we have rejected as to maintenance and repair costs, *supra,* at 777–779, and it can fare no better here. Obviously, if accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools.[44] Our cases, however, have long since foreclosed

[41] Brief for Appellee Anderson 25.

[42] *Ibid.*

[43] *Ibid.*

[44] None of the three dissenting opinions filed today purports to rely on any such statistical assurances of secularity. Indeed, under the rationale of those opinions, it is difficult to perceive any limitations on the amount of state aid that would be approved in the form of tuition grants.

the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of "effect" and "entanglement."

Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to promote the free exercise of religion. The State notes that only "low-income parents" are aided by this law, and without state assistance their right to have their children educated in a religious environment "is diminished or even denied." [45] It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, *e. g.*, *Everson* v. *Board of Education, supra; Walz* v. *Tax Comm'n, supra,* and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion.[46] In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy, *Everson* v. *Board of Education*, 330 U. S., at 18 (Jackson, J., dissenting), for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because

[45] N. Y. Educ. Law, Art. 12–A, § 559 (2) (Supp. 1972–1973) (legislative finding supporting tuition reimbursement).

[46] "[T]he basic purpose of these provisions . . . is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz* v. *Tax Comm'n*, 397 U. S., at 669.

of the constraints of "conscience and discipline," *ibid.*, and notwithstanding the "high social importance" of the State's purposes, *Wisconsin* v. *Yoder*, 406 U. S. 205, 214 (1972), neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted.

C

Sections 3, 4, and 5 establish a system for providing income tax benefits to parents of children attending New York's nonpublic schools. In this Court, the parties have engaged in a considerable debate over what label best fits the New York law. Appellants insist that the law is, in effect, one establishing a system of tax "credits." The State and the intervenors reject that characterization and would label it, instead, a system of income tax "modifications." The Solicitor General, in an *amicus curiae* brief filed in this Court, has referred throughout to the New York law as one authorizing tax "deductions." The District Court majority found that the aid was "in effect a tax *credit*," 350 F. Supp., at 672 (emphasis in original). Because of the peculiar nature of the benefit allowed, it is difficult to adopt any single traditional label lifted from the law of income taxation. It is, at least in its form, a tax deduction since it is an amount subtracted from adjusted gross income, prior to computation of the tax due. Its effect, as the District Court concluded, is more like that of a tax credit since the deduction is not related to the amount actually spent for tuition and is apparently designed to yield a predetermined amount of tax "forgiveness" in exchange for performing a specific act which the State desires to encourage—the usual attribute of a tax credit. We see no reason to select one label over another, as the constitutionality of this hybrid benefit does not turn in any event on the label we accord it. As MR. CHIEF JUSTICE BURGER's opinion for the Court in *Lemon* v. *Kurtzman*, 403 U. S., at 614, notes, constitu-

tional analysis is not a "legalistic minuet in which precise rules and forms must govern." Instead we must "examine the form of the relationship for the light that it casts on the substance."

These sections allow parents of children attending nonpublic elementary and secondary schools to subtract from adjusted gross income a specified amount if they do not receive a tuition reimbursement under § 2, and if they have an adjusted gross income of less than $25,000. The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute.[47] The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families. Thus, a parent who earns less than $5,000 is entitled to a tuition reimbursement of $50 if he has one child attending an elementary, nonpublic school, while a parent who earns more (but less than $9,000) is entitled to have a precisely equal amount taken off his tax bill.[48] Additionally, a taxpayer's benefit under these sections is unrelated to, and not reduced by, any deductions to which he may be entitled for charitable contributions to religious institutions.[49]

In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax

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[47] See n. 18, *supra*.

[48] The estimated-benefit table is reprinted in n. 19, *supra*.

[49] Since the program here does not have the elements of a genuine tax deduction, such as for charitable contributions, we do not have before us, and do not decide, whether that form of tax benefit is constitutionally acceptable under the "neutrality" test in *Walz*.

benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that "[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education." 350 F. Supp., at 675.

Appellees defend the tax portion of New York's legislative package on two grounds. First, they contend that it is of controlling significance that the grants or credits are directed to the parents rather than to the schools. This is the same argument made in support of the tuition reimbursements and rests on the same reading of the same precedents of this Court, primarily *Everson* and *Allen*. Our treatment of this issue in Part II–B, *supra*, at 780–785, is applicable here and requires rejection of this claim.[50] Second, appellees place their strongest reliance on *Walz* v. *Tax Comm'n*, *supra*, in which New York's property tax exemption for religious organizations was upheld. We think that *Walz* provides no support for appellees' position. Indeed, its rationale plainly compels the conclusion that New York's tax package violates the Establishment Clause.

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[50] Appellants conceded that "should the Court decide that Section 2 of the Act does not violate the Establishment Clause, we are unable to see how it could hold otherwise in respect to Sections 3, 4 and 5." Brief for Appellants 42–43. We agree that, under the facts of this case, the two are legally inseparable and that the affirmative of appellants' statement is also true, *i. e.*, if § 2 *does* violate the Establishment Clause so, too, do the sections conferring tax benefits.

Tax exemptions for church property enjoyed an apparently universal approval in this country both before and after the adoption of the First Amendment. The Court in *Walz* surveyed the history of tax exemptions and found that each of the 50 States has long provided for tax exemptions for places of worship, that Congress has exempted religious organizations from taxation for over three-quarters of a century, and that congressional enactments in 1802, 1813, and 1870 specifically exempted church property from taxation. In sum, the Court concluded that "[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally." 397 U. S., at 676–677.[51] We know of no historical precedent for New York's recently promulgated tax relief program. Indeed, it seems clear that tax benefits for parents whose children attend parochial schools are a recent innovation, occasioned by the growing financial plight of such nonpublic institutions and designed, albeit unsuccessfully, to tailor state aid in a manner not incompatible with the recent decisions of this Court. See *Kosydar* v. *Wolman*, 353 F. Supp. 744 (SD Ohio 1972), aff'd *sub nom. Grit* v. *Wolman*, *post*, p. 901.

But historical acceptance without more would not alone have sufficed, as "no one acquires a vested or protected right in violation of the Constitution by long use." *Walz*, 397 U. S., at 678. It was the reason underlying that long history of tolerance of tax exemptions for religion that proved controlling. A proper respect for both the Free Exercise and the Establishment Clauses compels the State

[51] The separate opinions of Mr. Justice Harlan and MR. JUSTICE BRENNAN also emphasize the historical acceptance of tax-exempt status for religious institutions. See 397 U. S., at 680, 694.

to pursue a course of "neutrality" toward religion. Yet governments have not always pursued such a course, and oppression has taken many forms, one of which has been taxation of religion. Thus, if taxation was regarded as a form of "hostility" toward religion, "exemption constitute[d] a reasonable and balanced attempt to guard against those dangers." *Id.*, at 673. Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.

Apart from its historical foundations, *Walz* is a product of the same dilemma and inherent tension found in most government-aid-to-religion controversies. To be sure, the exemption of church property from taxation conferred a benefit, albeit an indirect and incidental one. Yet that "aid" was a product not of any purpose to support or to subsidize, but of a fiscal relationship designed to minimize involvement and entanglement between Church and State. "The exemption," the Court emphasized, "tends to complement and reinforce the desired separation insulating each from the other." *Id.*, at 676. Furthermore, "[e]limination of the exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.*, at 674. The granting of the tax benefits under the New York statute, unlike the extension of an exemption, would tend to increase rather than limit the involvement between Church and State.

One further difference between tax exemptions for church property and tax benefits for parents should be

noted. The exemption challenged in *Walz* was not restricted to a class composed exclusively or even predominantly of religious institutions. Instead, the exemption covered all property devoted to religious, educational, or charitable purposes. As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. Without intimating whether this factor alone might have controlling significance in another context in some future case, it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor.[52]

In conclusion, we find the *Walz* analogy unpersuasive, and in light of the practical similarity between New York's tax and tuition reimbursement programs, we hold that neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.

III

Because we have found that the challenged sections have the impermissible effect of advancing religion, we need not consider whether such aid would result in entanglement of the State with religion in the sense of "[a] comprehensive, discriminating, and continuing state surveillance." *Lemon* v. *Kurtzman*, 403 U. S., at 619. But the importance of the competing societal interests implicated here prompts us to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.

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[52] See also n. 38, *supra*.

Few would question most of the legislative findings supporting this statute. We recognized in *Board of Education* v. *Allen,* 392 U. S., at 247, that "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience," and certainly private parochial schools have contributed importantly to this role. Moreover, the tailoring of the New York statute to channel the aid provided primarily to afford low-income families the option of determining where their children are to be educated is most appealing.[53] There is no doubt that the private schools are confronted with increasingly grave fiscal problems, that resolving these problems by increasing tuition charges forces parents to turn to the public schools, and that this in turn—as the present legislation recognizes—exacerbates the problems of public education at the same time that it weakens support for the parochial schools.

These, in briefest summary, are the underlying reasons for the New York legislation and for similar legislation in other States. They are substantial reasons. Yet they must be weighed against the relevant provisions and purposes of the First Amendment, which safeguard the separation of Church from State and which have been regarded from the beginning as among the most cherished features of our constitutional system.

One factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program. As Mr. Justice Black's opinion in *Everson*

[53] As noted in the opinion below: "This [litigation] is, in essence, a conflict between two groups of extraordinary good will and civic responsibility. One group fears the diminution of parochial religious education which is thought to be an integral part of their rights to the free exercise of religion. The other group, equally dedicated, believes that encroachment of Government in aid of religion is as dangerous to the secular state as encroachment of Government to restrict religion would be to its free exercise." 350 F. Supp., at 660.

v. *Board of Education, supra,* emphasizes, competition among religious sects for political and religious supremacy has occasioned considerable civil strife, "generated in large part" by competing efforts to gain or maintain the support of government. 330 U. S., at 8–9. As Mr. Justice Harlan put it, "[w]hat is at stake as a matter of policy [in Establishment Clause cases] is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Walz* v. *Tax Comm'n,* 397 U. S., at 694 (separate opinion).

The Court recently addressed this issue specifically and fully in *Lemon* v. *Kurtzman.* After describing the political activity and bitter differences likely to result from the state programs there involved, the Court said:

> "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." 403 U. S., at 623.[54]

The language of the Court applies with peculiar force to the New York statute now before us. Section 1 (grants for maintenance) and § 2 (tuition grants) will require continuing annual appropriations. Sections 3, 4, and 5 (income tax relief) will not necessarily require

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[54] The Court in *Lemon* further emphasized that political division along religious lines is to be contrasted with the political diversity expected in a democratic society: "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969)." 403 U. S., at 622.

annual re-examination, but the pressure for frequent enlargement of the relief is predictable. All three of these programs start out at modest levels: the maintenance grant is not to exceed $40 per pupil per year in approved schools; the tuition grant provides parents not more than $50 a year for each child in the first eight grades and $100 for each child in the high school grades; and the tax benefit, though more difficult to compute, is equally modest. But we know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases.[55] Moreover, the State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases.[56] In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration. And while the prospect of such divisive-

[55] As some 20% of the total school population in New York attends private and parochial schools, the constituent base supporting these programs is not insignificant.

[56] The self-perpetuating tendencies of any form of government aid to religion have been a matter of concern running throughout our Establishment Clause cases. In *Schempp*, the Court emphasized that it was "no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment," for what today is a "trickling stream" may be a torrent tomorrow. 374 U. S., at 225. See also *Lemon* v. *Kurtzman*, 403 U. S., at 624–625. But, to borrow the words from Mr. Justice Rutledge's forceful dissent in *Everson*, it is not alone the potential expandability of state tax aid that renders such aid invalid. Not even "three pence" could be assessed: "Not the amount but 'the principle of assessment was wrong.'" 330 U. S., at 40–41 (quoting from Madison's Memorial and Remonstrance).

ness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a "warning signal" not to be ignored. 403 U. S., at 625.

Our examination of New York's aid provisions, in light of all relevant considerations, compels the judgment that each, as written, has a "primary effect that advances religion" and offends the constitutional prohibition against laws "respecting an establishment of religion." We therefore affirm the three-judge court's holding as to §§ 1 and 2, and reverse as to §§ 3, 4, and 5.

It is so ordered.

MR. CHIEF JUSTICE BURGER, joined in part by MR. JUSTICE WHITE, and joined by MR. JUSTICE REHNQUIST, concurring in part and dissenting in part.*

I join in that part of the Court's opinion in *Committee for Public Education & Religious Liberty* v. *Nyquist*, *ante*, p. 756, which holds the New York "maintenance and repair" provision [1] unconstitutional under the Establishment Clause because it is a direct aid to religion. I disagree, however, with the Court's decisions in *Nyquist* and in *Sloan* v. *Lemon*, *post*, p. 825, to strike down the New York and Pennsylvania tuition grant programs and the New York tax relief provisions.[2] I believe the Court's decisions on those statutory provisions ignore the teachings of *Everson* v. *Board of Education*, 330 U. S. 1 (1947),

*[This opinion applies also to No. 72–459, *Sloan, Treasurer of Pennsylvania, et al.* v. *Lemon et al.*, and No. 72–620, *Crouter* v. *Lemon et al.*, *post*, p. 825.]

[1] N. Y. Laws 1972, c. 414, § 1, amending New York Educ. Law, Art. 12, §§ 549–553 (Supp. 1972–1973).

[2] Pa. Laws 1971, Act 92, Pa. Stat. Ann., Tit. 24, § 5701 *et seq.* (Supp 1973–1974); N. Y. Laws 1972, c. 414, § 2, amending N. Y. Educ. Law, Art. 12–A, §§ 559–563 (Supp. 1972–1973); N. Y. Laws 1972, c. 414, §§ 3, 4, and 5, amending N. Y. Tax Law §§ 612 (c), 612 (j) (Supp. 1972–1973).

and *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and fail to observe what I thought the Court had held in *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970). I therefore dissent as to those aspects of the two holdings.[3]

While there is no straight line running through our decisions interpreting the Establishment and Free Exercise Clauses of the First Amendment, our cases do, it seems to me, lay down one solid, basic principle: that the Establishment Clause does not forbid governments, state or federal, to enact a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that "aid" religious instruction or worship. Thus, in *Everson* the Court held that a New Jersey township could reimburse *all* parents of school-age children for bus fares paid in transporting their children to school. Mr. Justice Black's opinion for the Court stated that the New Jersey "legislation, as applied, does no more than provide a general program to *help parents* get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U. S., at 18 (emphasis added).

Twenty-one years later, in *Board of Education* v. *Allen*, *supra*, the Court again upheld a state program that provided for direct aid to the parents of all schoolchildren including those in private schools. The statute there required "local public school authorities to lend textbooks free of charge to all students in grades seven through 12; students attending private schools [were] included." 392 U. S., at 238. Recognizing that *Everson* was the case "most nearly in point," the *Allen* Court interpreted *Everson* as holding that "the Establishment

[3] MR. JUSTICE REHNQUIST's dissent, which I join, states the reasons why I believe the Court has gravely misrepresented the Court's opinion in *Walz*. In this opinion, I state additional reasons why I dissent from Parts II–B and II–C of the Court's opinion.

Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation . . . ." *Id.*, at 241–242. Applying that principle to the statute before it, the *Allen* Court stated:

> "Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely *makes available to all children* the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. *Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.*" *Id.*, at 243–244 (emphasis added).

The Court's opinions in both *Everson* and *Allen* recognized that the statutory programs at issue there may well have facilitated the decision of many parents to send their children to religious schools. *Everson* v. *Board of Education, supra,* at 17–18; *Board of Education* v. *Allen, supra,* at 242, 244. See *Norwood* v. *Harrison, ante,* at 463 n. 6 (1973). Indeed, the Court in both cases specifically acknowledged that some children might not obtain religious instruction but for the benefits provided by the State. Notwithstanding, the Court held that such an indirect or incidental "benefit" to the religious institutions that sponsored parochial schools was not a conclusive indicium of a "law respecting an establishment of religion." [4]

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[4] In *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971), the Court specifically distinguished *Everson* and *Allen* on the ground that those cases involved aid to the parents and children and not to parochial schools:

"The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. *This factor distinguishes both Everson and Allen, for in both those*

One other especially pertinent decision should be noted. In *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908), the Court considered the question whether government aid to individuals who choose to use the benefits for sectarian purposes contravenes the Establishment Clause. There the Federal Government had set aside certain trust and treaty funds for the educational benefit of the members of the Sioux Indian Tribe. When some beneficiaries elected to attend religious schools, and the Government entered into payment contracts with the sectarian institutions, suit was brought to enjoin the disbursement of public money to those schools. Speaking of the constitutionality of such a program, the Court said:

> "But we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the Government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof." *Id.*, at 81–82.

The essence of all these decisions, I suggest, is that government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions. I say "generally" because it is obviously possible to conjure hypothetical statutes that constitute either a subterfuge for direct aid to religious institutions or a discriminatory enactment favoring religious over nonreligious activities. Thus, a State could not enact a statute providing for a $10 gratuity to everyone who attended religious services weekly. Such a law would plainly be governmental sponsorship of religious activities; no statutory preamble expressing purely sec-

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cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. . . ." *Id.*, at 621 (emphasis, except for case names, added).

ular legislative motives would be persuasive. But, at least where the state law is genuinely directed at enhancing a recognized freedom of individuals, even one involving both secular and religious consequences, such as the right of parents to send their children to private schools, see *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), the Establishment Clause no longer has a prohibitive effect.[5]

This fundamental principle which I see running through our prior decisions in this difficult and sensitive field of law, and which I believe governs the present cases, is premised more on experience and history than on logic. It is admittedly difficult to articulate the reasons why a State should be permitted to reimburse parents of private school children—partially at least—to take into account the State's enormous savings in not having to provide schools for those children, when a State is not allowed to pay the same benefit directly to sectarian schools on a per-pupil basis. In either case, the private individual makes the ultimate decision that may indirectly benefit church-sponsored schools; to that extent the state involvement with religion is substantially attenuated. The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families. This judgment reflects the caution with which we scrutinize any effort to give official support to religion and the tolerance with which we treat general welfare legislation. But, whatever its

[5] These considerations do not, however, justify similar state assistance accruing to the benefit of private schools having discriminatory policies. See *Norwood* v. *Harrison*, *ante*, at 461–468.

basis, that principle is established in our cases, from the early case of *Quick Bear* to the more recent holdings in *Everson* and *Allen*, and it ought to be followed here.

The tuition grant and tax relief programs now before us are, in my view, indistinguishable in principle, purpose, and effect from the statutes in *Everson* and *Allen*. In the instant cases as in *Everson* and *Allen*, the States have merely attempted to equalize the costs incurred by parents in obtaining an education for their children. The only discernible difference between the programs in *Everson* and *Allen* and these cases is in the method of the distribution of benefits: here the particular benefits of the Pennsylvania and New York statutes are given only to parents of private school children, while in *Everson* and *Allen* the statutory benefits were made available to parents of both public and private school children. But to regard that difference as constitutionally meaningful is to exalt form over substance. It is beyond dispute that the parents of public school children in New York and Pennsylvania presently receive the "benefit" of having their children educated totally at state expense; the statutes enacted in those States and at issue here merely attempt to equalize that "benefit" by giving to parents of private school children, in the form of dollars or tax deductions, what the parents of public school children receive in kind. It is no more than simple equity to grant partial relief to parents who support the public schools they do not use.

The Court appears to distinguish the Pennsylvania and New York statutes from *Everson* and *Allen* on the ground that here the state aid is not apportioned between the religious and secular activities of the sectarian schools attended by some recipients, while in *Everson* and *Allen* the state aid was purely secular in nature. But that distinction has not been followed in the past, see *Quick Bear* v. *Leupp, supra*, and is not likely to be considered

controlling in the future. There are at present many forms of government assistance to individuals that can be used to serve religious ends, such as social security benefits or "G. I. Bill" payments, which are not subject to nonreligious-use restrictions. Yet, I certainly doubt that today's majority would hold those statutes unconstitutional under the Establishment Clause.

Since I am unable to discern in the Court's analysis of *Everson* and *Allen* any neutral principle to explain the result reached in these cases, I fear that the Court has in reality followed the unsupportable approach of measuring the "effect" of a law by the percentage of the recipients who choose to use the money for religious, rather than secular, education. Indeed, in discussing the New York tax credit provisions, the Court's opinion argues that the "tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools." *Ante,* at 794. While the opinion refrains from "intimating whether this factor alone might have controlling significance in another context in some future case," *ibid.,* similar references to this factor elsewhere in the Court's opinion suggest that it has been given considerable weight. Thus, the Court observes as to the New York tuition grant program: "Indeed, it is precisely the function of New York's law to provide assistance to private schools, *the great majority of which are sectarian.*" *Ante,* at 783 (emphasis added).

With all due respect, I submit that such a consideration is irrelevant to a constitutional determination of the "effect" of a statute. For purposes of constitutional adjudication of that issue, it should make no difference whether 5%, 20%, or 80% of the beneficiaries of an educational program of general application elect to utilize their benefits for religious purposes. The "primary effect" branch of our three-pronged test was never, at least to my understanding, intended to vary with the

number of churches benefited by a statute under which state aid is distributed to private citizens.

Such a consideration, it is true, might be relevant in ascertaining whether the *primary legislative purpose* was to advance the cause of religion. But the Court has, and I think correctly, summarily dismissed the contention that either New York or Pennsylvania had an improper purpose in enacting these laws. The Court fully recognizes that the legislatures of New York and Pennsylvania have a legitimate interest in "promoting pluralism and diversity among . . . public and nonpublic schools," *ante*, at 773, in assisting those who reduce the State's expenses in providing public education, and in protecting the already overburdened public school system against a massive influx of private school children. And in light of this Court's recognition of these secular legislative purposes, I fail to see any acceptable resolution to these cases except one favoring constitutionality.

I would therefore uphold these New York and Pennsylvania statutes. However sincere our collective protestations of the debt owed by the public generally to the parochial school systems, the wholesome diversity they engender will not survive on expressions of good will.

MR. JUSTICE WHITE joins this opinion insofar as it relates to the New York and Pennsylvania tuition grant statutes and the New York tax relief statute.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE WHITE concur, dissenting in part.

Differences of opinion are undoubtedly to be expected when the Court turns to the task of interpreting the meaning of the Religion Clauses of the First Amendment, since our previous cases arising under these Clauses, as the Court notes, "have presented some of the most perplexing questions to come before this Court." *Ante*,

at 760. I dissent from those portions of the Court's opinion which strike down §§ 2 through 5, N. Y. Laws 1972, c. 414. Section 2 grants limited state aid to low-income parents sending their children to nonpublic schools and §§ 3 through 5 make roughly comparable benefits available to middle-income parents through the use of tax deductions. I find both the Court's reasoning and result all but impossible to reconcile with *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970), decided only three years ago, and with *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and *Everson* v. *Board of Education*, 330 U. S. 1 (1947).

I

The opinions in *Walz, supra*, make it clear that tax deductions and exemptions, even when directed to religious institutions, occupy quite a different constitutional status under the Religion Clauses of the First Amendment than do outright grants to such institutions. MR. CHIEF JUSTICE BURGER, speaking for the Court in *Walz*, said:

> "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.' *There is no genuine nexus between tax exemption and establishment of religion.*" 397 U. S., at 675 (emphasis added).

MR. JUSTICE BRENNAN in his concurring opinion amplified the distinction between tax benefits and direct payments in these words:

> "Tax exemptions and general subsidies, however, are qualitatively different. Though both provide

> economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer. . . . Tax exemptions, accordingly, constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy." *Id.*, at 690–691 (footnotes omitted).

Here the effect of the tax benefit is trebly attenuated as compared with the outright exemption considered in *Walz*. There the result was a complete forgiveness of taxes, while here the result is merely a reduction in taxes. There the ultimate benefit was available to an actual house of worship, while here even the ultimate benefit redounds only to a religiously sponsored school. There the churches themselves received the direct reduction in the tax bill, while here it is only the parents of the children who are sent to religiously sponsored schools who receive the direct benefit.

The Court seeks to avoid the controlling effect of *Walz* by comparing its historical background to the relative recency of the challenged deduction plan; by noting that in its historical context, a property tax exemption is religiously neutral, whereas the educational cost deduction here is not; and by finding no substantive difference between a direct reimbursement from the State to parents and the State's abstention from collecting the full tax bill which the parents would otherwise have had to pay.

While it is true that the Court reached its result in *Walz* in part by examining the unbroken history of property tax exemptions for religious organizations in this country, there is no suggestion in the opinion that only those particular tax exemption schemes that have roots in pre-Revolutionary days are sustainable against an

Establishment Clause challenge. As the Court notes in its opinion, historical acceptance alone would not have served to validate the tax exemption upheld in *Walz* because " 'no one acquires a vested or protected right in violation of the Constitution by long use.' " *Ante,* at 792, citing 397 U. S., at 678.

But what the Court gives in the form of *dicta* with one hand, it takes away in the form of its holding with the other. For if long-established use of a particular tax exemption scheme leads to a holding that the scheme is constitutional, that holding should extend equally to newly devised tax benefit plans which are indistinguishable in principle from those long established.

The Court's statements that "[s]pecial tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court," *ante,* at 793, and that "insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions," *ibid.,* are impossible to reconcile with *Walz.* Who can doubt that the tax exemptions which that case upheld were every bit as much of a "special tax benefit" as the New York tax deduction plan here, or that the benefits resulting from the exemption in *Walz* had every bit as much tendency to "aid and advance . . . religious institutions" as did New York's plan here?

The Court nonetheless declares that what has been authorized by the legislature is not a true deduction and in substance provides an incentive for parents to send their children to sectarian schools because the amount deductible from adjusted gross income bears no relationship to amounts actually expended for nonpublic education. Support for its notion that the authorization is essentially the same as a tax credit or a reimbursement is drawn from the fact that the net benefit under the

reimbursement plan established in § 2 of c. 414 is equal to the net tax savings for those at the lower-income end of the tax deduction plan.[1] But the deduction here allowed is analytically no different from any other flat-rate exemptions or deductions currently in use in both federal and state tax systems. Surely neither the standard deduction,[2] usable by those taxpayers who do not itemize their deductions, nor personal [3] or dependency exemptions,[4] for example, bear any relationship whatsoever to the actual expenses accrued in earning any of them. Yet none of these could properly be called a reimbursement from the State. And it would take more of a record [5] than is present in this case to prove that the

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[1] N. Y. Laws 1972, c. 414, § 2, provided for flat tuition grants of $50 per year for parents who had children in nonpublic primary schools and $100 per year for parents whose children were attending nonpublic secondary schools. Tuition reimbursements were limited, however, to 50% of amounts actually expended, and only those parents whose adjusted gross incomes were less than $5,000 were eligible.

A table of estimated benefits from the tax modifications contained in §§ 4 and 5 was submitted to the legislators. That table indicated that taxpayers whose adjusted gross income fell between $5,000 and $9,000 received an estimated $50 per dependent attending nonpublic schools. The number of allowable deductions was limited to three.

[2] See, *e. g.*, 26 U. S. C. § 141 *et seq.* Currently, the maximum standard deduction allowable under the income tax laws is $2,000, regardless of a taxpayer's income or the number of his dependents. §141 (b). Similarly, there is a minimum low income allowance of $1,000 for those who do not qualify for the percentage standard deduction. § 141 (c). Between these extremes, there is a standard deduction of 15% of adjusted gross income, § 141 (b).

[3] See, *e. g.*, 26 U. S. C. § 151 *et seq.*

[4] 26 U. S. C. § 151 (e).

[5] There was no discovery or other development of a factual record in this case. There is, therefore, no indication as to how much tuition payments in nonpublic schools average and whether the relatively minor benefits under the plan could realistically be said to provide any incentive. And yet the Court has struck down this

possibility of a slightly lower aggregate tax bill accorded New York taxpayers who send their dependents to nonpublic schools provides any more incentive to send children to such schools than personal exemptions provide for getting married or having children. That parents might incidentally find it easier to send children to nonpublic schools has not heretofore been held to require invalidation of a state statute. *Board of Education* v. *Allen, supra; Everson* v. *Board of Education, supra.*

The sole difference between the flat-rate exemptions currently in widespread use and the deduction established in §§ 4 and 5 is that the latter provides a regressive benefit. This legislative judgment, however, as to the appropriate spread of the expense of public and nonpublic education is consonant with the State's concern that those at the lower end of the income brackets are less able to exercise freely their consciences by sending their children to nonpublic schools, and is surely consistent with the "benevolent neutrality" we try to uphold in reconciling the tension between the Free Exercise and Establishment Clauses. *Walz, supra,* at 669. Regardless of what the Court chooses to call the New York plan, it is still abstention from taxation, and that abstention stands on no different theoretical footing, in terms of running afoul of the Establishment Clause, from any other deduction or exemption currently allowable for religious contributions or activities.[6] The invalidation of the New York plan is directly contrary to this Court's pronouncements in *Walz, supra.*

II

In striking down both plans, the Court places controlling weight on the fact that the State has not pur-

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plan, arguing that its inevitable result is to encourage parents to send children to religious schools.

[6] See, *e. g.*, 26 U. S. C. §§ 170, 2055, 2522.

ported to restrict to secular purposes either the reimbursements or the money which it has not taxed. This factor assertedly serves to distinguish *Board of Education* v. *Allen, supra,* and *Everson* v. *Board of Education, supra,* and compels the result that inevitably the primary effect of the plans is to provide financial support for sectarian schools.

In *Everson, supra,* the Court sustained the constitutional validity of a New Jersey statute and resulting school board regulation that provided, in part, for the direct reimbursement to parents of children attending sectarian schools of amounts expended in providing public transportation to and from such schools. Expressly noting that the challenged regulation undoubtedly helped children to get to church schools and that

> "[t]here is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State . . . ," 330 U. S., at 17,

the majority in an opinion written by Mr. Justice Black held that the state scheme did not violate the Establishment Clause. And it was emphasized that the State in that case contributed no money to the schools, *id.,* at 18; rather it did no more than effectuate a secular purpose—the transportation of children safely and expeditiously to and from accredited schools.

Similarly in *Allen, supra,* a state program whereby secular textbooks were loaned to all children in accredited schools was approved as consistent with the Establishment Clause, even though the Court recognized that free books made it more likely that some children would choose to attend a sectarian school. 392 U. S., at 244. It was again emphasized that "no funds or books [were] fur-

nished to parochial schools," and that therefore "the financial benefit [was] to parents and children, not to schools." *Id.*, at 243–244. This factor was considered crucial in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), where the Court stated, at 621:

> "The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. *This factor distinguishes both Everson and Allen, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. . . .*" (Emphasis added.)

Both *Everson* and *Allen* gave significant recognition to the "benevolent neutrality" concept, and the Court was guided by the fact that any effect from state aid to parents has a necessarily attenuated impact on religious institutions when compared to direct aid to such institutions.

The reimbursement and tax benefit plans today struck down, no less than the plans in *Everson* and *Allen*, are consistent with the principle of neutrality. New York has recognized that parents who are sending their children to nonpublic schools are rendering the State a service by decreasing the costs of public education and by physically relieving an already overburdened public school system. Such parents are nonetheless compelled to support public school services unused by them and to pay for their own children's education. Rather than offering "an incentive to parents to send their children to sectarian schools," *ante*, at 786, as the majority suggests, New York is effectuating the secular purpose of the equalization of the cost of educating New York children that are borne by parents who send their children to nonpublic schools. As in *Everson* and *Allen*, the impact, if any, on religious

education from the aid granted is significantly diminished by the fact that the benefits go to the parents rather than to the institutions.

The increasing difficulties faced by private schools in our country are no reason at all for this Court to readjust the admittedly rough-hewn limits on governmental involvement with religion which are found in the First and Fourteenth Amendments. But, quite understandably, these difficulties can be expected to lead to efforts on the part of those who wish to keep alive pluralism in education to obtain through legislative channels forms of permissible public assistance which were not thought necessary a generation ago. Within the limits permitted by the Constitution, these decisions are quite rightly hammered out on the legislative anvil. If the Constitution does indeed allow for play in the legislative joints, *Walz, supra,* at 669, the Court must distinguish between a new exercise of power within constitutional limits and an exercise of legislative power which transgresses those limits. I believe the Court has failed to make that distinction here, and I therefore dissent.

MR. JUSTICE WHITE, joined in part by THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, dissenting.*

Each of the States regards the education of its young to be a critical matter—so much so that it compels school attendance and provides an educational system at public expense. Any otherwise qualified child is entitled to a free elementary and secondary school education, or at least an education that costs him very little as compared with its cost to the State.

This Court has held, however, that the Due Process Clause of the Fourteenth Amendment to the Constitu-

*[This opinion applies also to No. 72–459, *Sloan, Treasurer of Pennsylvania, et al.* v. *Lemon et al.*, and No. 72–620, *Crouter* v. *Lemon et al., post,* p. 825.]

tion entitles parents to send their children to nonpublic schools, secular or sectarian, if those schools are sufficiently competent to educate the child in the necessary secular subjects. *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925). About 10% of the Nation's children, approximately 5.2 million students, now take this option and are not being educated in public schools at public expense. Under state law these children have a right to a free public education and it would not appear unreasonable if the State, relieved of the expense of educating a child in the public school, contributed to the expense of his education elsewhere. The parents of such children pay taxes, including school taxes. They could receive in return a free education in the public schools. They prefer to send their children, as they have the right to do, to nonpublic schools that furnish the satisfactory equivalent of a public school education but also offer subjects or other assumed advantages not available in public schools. Constitutional considerations aside, it would be understandable if a State gave such parents a call on the public treasury up to the amount it would have cost the State to educate the child in public school, or, to put it another way, up to the amount the parents save the State by not sending their children to public school.

In light of the Free Exercise Clause of the First Amendment, this would seem particularly the case where the parent desires his child to attend a school that offers not only secular subjects but religious training as well. A State should put no unnecessary obstacles in the way of religious training for the young. "When the state encourages religious instruction . . . it follows the best of our traditions." *Zorach* v. *Clauson,* 343 U. S. 306, 313–314 (1952); *Walz* v. *Tax Comm'n,* 397 U. S. 664, 676 (1970). Positing an obligation on the State to educate its children, which every State acknowledges, it should be wholly acceptable for the State to contribute

to the secular education of children going to sectarian schools rather than to insist that if parents want to provide their children with religious as well as secular education, the State will refuse to contribute anything to their secular training.

Historically, the States of the Union have not furnished public aid for education in private schools. But in the last few years, as private education, particularly the parochial school system, has encountered financial difficulties, with many schools being closed and many more apparently headed in that direction, there has developed a variety of programs seeking to extend at least some aid to private educational institutions. Some States have provided only fringe benefits or auxiliary services. Others attempted more extensive efforts to keep the private school system alive. Some made direct arrangements with private and parochial schools for the purchase of secular educational services furnished by those schools.[1] Others provided tuition grants to parents sending their children to private schools, permitted dual enrollments or shared-time arrangements or extended substantial tax benefits in some form.[2]

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[1] This kind of program was adopted by Pennsylvania and Rhode Island and was declared invalid in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971).

[2] Based on State Aid to Non-Public Schools, a publication of the Department of Special Projects, National Catholic Educational Association, the following summarizes, as of February 1, 1972, the various types of aid to nonpublic schools available in the various States, exclusive of those types of support finally declared unconstitutional by this Court:

Direct Aid Programs:

Parental Grants or Reimbursement Schemes: 5 States (including New York and Pennsylvania).

Dual Enrollment (Shared Time): 9 States.

Tax Credits: 6 States (including New York).

[*Footnote 2 continued on p. 816*]

The dimensions of the situation are not difficult to outline.[3] The 5.2 million private elementary and secondary school students in 1972 attended some 3,200 nonsectarian private schools and some 18,000 schools that are church related. Twelve thousand of the latter were Roman Catholic schools and enrolled 4.37 million pupils or 83% of the total nonpublic school membership. Sixty-

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Leasing of Nonpublic School Facilities by Public School Systems: 4 States.

Educational Opportunities for Rural Students: 1 State (Alaska).

Innovative Programs: 1 State (Illinois).

Exemption from State Sales Tax for Educational and Janitorial Supplies: 1 State (North Dakota).

Auxiliary Services or Benefits:

Transportation: 24 States plus District of Columbia.

Textbooks and Instructional Materials: 14 States.

Health and Welfare Services (*i. e.*, school physician, nurse, dental services, hygienist, psychologist, speech therapist, social worker, etc.): 15 States.

Driver Education: 7 States (applies only to dually enrolled students in South Dakota).

Services for Educationally Disadvantaged Children, Educational Testing, and Miscellaneous (principally aid services for deaf, blind, handicapped, or retarded children; educational testing; remedial programs, etc.): 11 States.

School Lunches: 2 States (New York and Louisiana).

Released Time: 2 States (Michigan and South Dakota).

Vocational Education: 2 States (Ohio and California).

Central Purchasing of Supplies: 2 States (Oregon and Washington).

Participation of Lay Teachers in Non-Public Schools in Public School Teachers Retirement Fund Scheme: 1 State (North Dakota).

A total of 16 States now extend one or more types of direct aid. 33 States, including almost all of the foregoing 16, offer auxiliary services or benefits. At least 19 States have constitutional or statutory barriers to any kind of direct aid to parochial schools.

[3] The data in this and the following paragraph of the text are taken from Final Report, President's Panel on Nonpublic Education, 1972, pp. 5–6, 15–19. See also Hearings on H. R. 16141 and other pending proposals, before the House Committee on Ways and Means, 92d Cong., 2d Sess., 118–119, 127–131.

two percent of nonpublic school students are concentrated in eight industrialized, urbanized States: New York, Pennsylvania, Illinois, California, Ohio, New Jersey, Michigan, and Massachusetts.[4] Eighty-three percent of the nonpublic school enrollment is to be found in large metropolitan areas. Nearly one out of five students in cities that are among the Nation's largest is enrolled in a nonpublic school.[5]

Nonpublic school enrollment has dropped at the rate of 6% per year for the past five years. Projected to 1980, it is estimated that seven States (the eight mentioned in the text less Massachusetts) will lose 1,416,122 nonpublic school students. Whatever the reasons, there has been, and there probably will continue to be, a movement to the public schools, with the prospect of substantial increases

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[4] Nonpublic enrollments in these States are as follows: New York, 789,110; Pennsylvania, 518,435; Illinois, 451,724; California, 398,981; Ohio, 339,435; New Jersey, 298,548; Michigan, 264,089; and Massachusetts, 205,011.

[5] Enrollments in nonpublic schools in 15 of the country's largest cities are as follows:

City	Nonpublic enrollment	Percentage of total
New York	358,594	24.3
Chicago	208,174	27.3
Philadelphia	146,298	33.6
Detroit	58,228	16.5
Los Angeles	43,601	6.3
New Orleans	41,938	27.2
Cleveland	36,922	19.4
Pittsburgh	36,661	19.4
Buffalo	36,623	33.8
Boston	35,237	27.1
Baltimore	33,833	15.0
Cincinnati	32,653	27.4
Milwaukee	32,256	19.8
San Francisco	29,582	23.9
St. Paul	22,267	30.3

in public school budgets that are already under intense attack and with the States and cities that are primarily involved already facing severe financial crises. It is this prospect that has prompted some of these States to attempt, by a variety of devices, to save, or slow the demise of, the nonpublic school system, an educational resource that could deliver quality education at a cost to the public substantially below the per-pupil cost of the public schools.[6]

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[6] The direct-aid programs for nonpublic schools available in the eight principally affected States listed in n. 4 are as follows:

New York

A. Full tuition and board for deaf and blind children educated at state-approved nonpublic schools.

B. Tuition (up to $2,000) for handicapped children educated at nonpublic schools.

C. Teacher salary payments to nonpublic schools operated by incorporated orphan asylum societies.

D. Omnibus Education Act.

1. Health and safety grants for nonpublic schools qualifying under Title IV of the Higher Education Act of 1965 as serving areas with high concentrations of poverty families.

2. Tuition assistance grants for parents with taxable incomes under $5,000.

3. Tax credit assistance for parents with incomes from $9,000–$25,000.

E. Mandated Services Act.

1. Reimbursement of nonpublic schools for costs of fulfilling state administrative requirements.

Pennsylvania

A. Dual enrollment.

B. Parent Reimbursement Act.

1. Reimbursement of parents for actual costs of nonpublic education of their children up to $75 for elementary school students and $150 for secondary school students.

Illinois

A. Grants to children from poverty families for actual costs of nonpublic education up to amount of state aid child would receive if attending public school.

[*Foonote 6 continued on p. 819*]

There are, then, the most profound reasons, in addition to those normally attending the question of the constitutionality of a state statute, for this Court to proceed with the utmost care in deciding these cases. It should not, absent a clear mandate in the Constitution, invalidate these New York and Pennsylvania statutes and thereby not only scuttle state efforts to hold off serious financial problems in their public schools but

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B. Special grants for innovative programs.

California

A. Tax credit assistance for parents with incomes ranging to $19,000. Maximum credit is $125 per child per year in nonpublic school.

Ohio

A. Dual enrollment with respect to vocational training.

B. Tax credit assistance for parents of nonpublic school students up to $90 per child per year.

New Jersey

No direct aid.

Michigan

A. Released time.

B. Dual enrollment.

Recent state constitutional amendment precludes all other forms of direct aid.

Massachusetts

Direct aid is barred by state constitutional provision.

The estimated 1970 population (in thousands) of Catholics in relation to the total population in each of these eight States was as follows:

	Total Population	Estimated Catholics	Catholic/Total
Massachusetts	5,241	2,947	56.2%
New Jersey	7,332	2,898	39.5%
New York	18,361	6,558	35.7%
Pennsylvania	11,871	3,658	30.8%
Illinois	10,751	3,455	32.1%
Michigan	9,433	2,383	25.3%
Ohio	10,612	2,265	21.3%
California	20,250	4,053	20.0%

Source: State Aid to Non-Public Schools, see n. 2, *supra*.

also make it more difficult, if not impossible, for parents to follow the dictates of their conscience and seek a religious as well as secular education for their children.

I am quite unreconciled to the Court's decision in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971). I thought then, and I think now, that the Court's conclusion there was not required by the First Amendment and is contrary to the long-range interests of the country. I therefore have little difficulty in accepting the New York maintenance grant, which does not and could not, by its terms, approach the actual repair and maintenance cost incurred in connection with the secular education services performed for the State in parochial schools. But, accepting *Lemon* and the invalidation of the New York maintenance grant, I would, with THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST, sustain the New York and Pennsylvania tuition grant statutes and the New York tax credit provisions.

No one contends that he can discern from the sparse language of the Establishment Clause that a State is forbidden to aid religion in any manner whatsoever or, if it does not mean that, what kind of or how much aid is permissible. And one cannot seriously believe that the history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church-state relations. In the end, the courts have fashioned answers to these questions as best they can, the language of the Constitution and its history having left them a wide range of choice among many alternatives. But decision has been unavoidable; and, in choosing, the courts necessarily have carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships.

The course of these decisions has made it clear that the First Amendment does not bar all state aid to religion, of whatever kind or extent. States do, and

they may, furnish churches and parochial schools with police and fire protection as well as water and sewage facilities. Also, "[a]ll of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees." *Walz* v. *Tax Comm'n,* 397 U. S., at 676. This is a multimillion-dollar benefit to religious institutions, see DOUGLAS, J., dissenting, in *Walz, supra,* at 714, but a benefit that this Court has held is wholly consistent with the First Amendment. Bus transportation may be furnished to students attending parochial schools as well as to those going to public schools. *Everson* v. *Board of Education,* 330 U. S. 1 (1947). So, too, the State may furnish school books to such students, *Board of Education* v. *Allen,* 392 U. S. 236 (1968), although in doing so they "relieved those churches of an enormous aggregate cost for those books." *Walz, supra,* at 671–672. A State may also become the owner of the property of a church-sponsored college and lease it back to the college, all with the purpose and effect of permitting revenue bonds issued in connection with the college's operation to be tax exempt and working a lower rate of interest and substantial savings to the sectarian institution. *Hunt* v. *McNair, ante,* p. 734.

The Court thus has not barred all aid to religion or to religious institutions. Rather, it has attempted to devise a formula that would help identify the kind and degree of aid that is permitted or forbidden by the Establishment Clause. Until 1970, the test for compliance with the Clause was whether there was "a secular legislative purpose and a primary effect that neither advances nor inhibits religion . . ."; given a secular purpose, what is "the primary effect of the enactment?" *School District of Abington Township* v. *Schempp,* 374 U. S. 203, 222 (1963); *Board of Education* v. *Allen, supra,* at 243. In 1970, a third element surfaced—whether there is "an

excessive government entanglement with religion." *Walz* v. *Tax Comm'n, supra,* at 674. That element was not fatal to real property tax exemptions for church property but proved to be the crucial element in *Lemon* v. *Kurtzman, supra,* where the Court struck down the efforts by the States of Pennsylvania and Rhode Island to stave off financial disaster for their parochial school systems, the saving of which each of these States deemed important to the public interest. In accordance with one formula or the other, the laws in question furnished part of the cost incurred by private schools in furnishing secular education to substantial segments of the children in those States. Conceding a valid secular purpose and not reaching the question of primary effect, the Court concluded that the laws excessively, and therefore fatally, entangled the State with religion. What appeared to be an insoluble dilemma for the States, however, proved no insuperable barrier to the Federal Government in aiding sectarian institutions of higher learning by direct grants for specified facilities, *Tilton* v. *Richardson,* 403 U. S. 672 (1971). And *Hunt* v. *McNair, supra,* evidences the difficulty in perceiving when the State's involvement with religion passes the peril point.

But whatever may be the weight and contours of entanglement as a separate constitutional criterion, it is of remote relevance in the cases before us with respect to the validity of tuition grants or tax credits involving or requiring no relationships whatsoever between the State and any church or any church school. So, also, the Court concedes the State's genuine secular purpose underlying these statutes. It therefore necessarily arrives at the remaining consideration in the threefold test which is apparently accepted from prior cases: Whether the law in question has "a primary effect that neither advances nor inhibits religion." *School District of Abington Township* v. *Schempp, supra.* While purporting to

accept the standard stated in this manner, the Court strikes down the New York maintenance law, because its "effect, inevitably, is to subsidize and advance the religious mission of sectarian schools," and for the same reason invalidates the tuition grants. See *ante,* at 779–780. But the test is one of "primary" effect not *any* effect. The Court makes no attempt at that ultimate judgment necessarily entailed by the standard heretofore fashioned in our cases. Indeed, the Court merely invokes the statement in *Everson* v. *Board of Education,* 330 U. S., at 16, that no tax can be levied "to support any religious activities . . . ." But admittedly there was no tax levied here for the *purpose* of supporting religious activities; and the Court appears to accept those cases, including *Tilton,* that inevitably involved aid of some sort or in some amount to the religious activities of parochial schools. In those cases, the judgment was that as long as the aid to the school could fairly be characterized as supporting the secular educational functions of the school, whatever support to religion resulted from this direct, *Tilton* v. *Richardson, supra,* or indirect, *Everson* v. *Board of Education, supra; Board of Education* v. *Allen, supra; Walz* v. *Tax Comm'n, supra; Hunt* v. *McNair, supra,* contribution to the school's overall budget was not violative of the primary-effect test or of the Establishment Clause.

There is no doubt here that Pennsylvania and New York have sought in the challenged laws to keep their parochial schools system alive and capable of providing adequate secular education to substantial numbers of students. This purpose satisfies the Court, even though to rescue schools that would otherwise fail will inevitably enable those schools to continue whatever religious functions they perform. By the same token, it seems to me, preserving the secular functions of these schools is the overriding consequence of these laws and the resulting,

but incidental, benefit to religion should not invalidate them.

At the very least I would not strike down these statutes on their face. The Court's opinion emphasizes a particular kind of parochial school, one restricted to students of particular religious beliefs and conditioning attendance on religious study. Concededly, there are many parochial schools that do not impose such restrictions. Where they do not, it is even more difficult for me to understand why the primary effect of these statutes is to advance religion. I do not think it is and therefore dissent from the Court's judgment invalidating the challenged New York and Pennsylvania statutes.

THE CHIEF JUSTICE and MR. JUSTICE REHNQUIST join this opinion insofar at it relates to the New York and Pennsylvania tuition grant statutes and the New York tax credit statute.

Syllabus

SLOAN, TREASURER OF PENNSYLVANIA, ET AL. *v.* LEMON ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 72–459. Argued April 16, 1973—Decided June 25, 1973*

Subsequent to *Lemon* v. *Kurtzman*, 403 U. S. 602, Pennsylvania enacted the "Parent Reimbursement Act for Nonpublic Education," providing funds to reimburse parents for a portion of tuition expenses incurred in sending their children to nonpublic schools. The three-judge District Court held that the law violated the Establishment Clause, granted plaintiffs' motion for summary judgment, and permanently enjoined disbursement of any funds under the Act. The Court also indicated that "more than 90% of the children attending nonpublic schools in . . . Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith," and ruled that the Act could not properly be viewed as containing a separable provision for aid to parents whose children attended *nonsectarian*, nonpublic schools. *Held:*

1. There is no constitutionally significant difference between Pennsylvania's tuition grant scheme, with its intended consequence of preserving and supporting religion-oriented institutions, and New York's tuition reimbursement program held violative of the Establishment Clause in *Committee for Public Education & Religious Liberty* v. *Nyquist*, *ante*, p. 756. Pp. 828–833.

2. The Act is not severable, but even if it were clearly severable, valid aid to nonpublic, nonsectarian schools can provide no basis for sustaining aid to sectarian schools. The Equal Protection Clause cannot be relied upon to sustain a program violative of the Establishment Clause. Pp. 833–835.

340 F. Supp. 1356, affirmed.

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL, and BLACKMUN, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which WHITE and REHN-

*Together with No. 72–620, *Crouter* v. *Lemon et al.*, also on appeal from the same court.

QUIST, JJ., joined, *ante*, p. 798. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined, *ante*, p. 813.

Israel Packel, Attorney General of Pennsylvania, argued the cause for appellant Sloan in No. 72–459. With him on the brief were *Peter W. Brown* and *J. Justin Blewitt, Jr.*, Deputy Attorneys General. *William Bentley Ball* argued the cause for appellants Diaz et al. in No. 72–459. With him on the briefs were *Joseph G. Skelly, James E. Gallagher, Jr., C. Clark Hodgson, Jr.*, and *William D. Valente*. *Henry T. Reath* argued the cause and filed a brief for appellant in No. 72–620.

Theodore R. Mann argued the cause for appellees in both cases. With him on the brief was *Leo Pfeffer*.†

MR. JUSTICE POWELL delivered the opinion of the Court.

On June 28, 1971, this Court handed down *Lemon* v. *Kurtzman*, 403 U. S. 602, in which Pennsylvania's "Nonpublic Elementary and Secondary Education Act" was held unconstitutional as violative of the Establishment Clause of the First Amendment. That law authorized the State to reimburse nonpublic, sectarian schools for their expenditures on teachers' salaries, textbooks, and instructional materials used in specified "secular" courses.

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†Briefs of *amici curiae* urging reversal in both cases were filed by *Acting Solicitor General Friedman, Assistant Attorney General Wood, Harriet S. Shapiro, Walter H. Fleischer*, and *Thomas G. Wilson* for the United States; by *Joseph J. Carlin* for the city of Philadelphia; and by *Ethan A. Hitchcock* for the National Association of Independent Schools, Inc.

Briefs of *amici curiae* urging affirmance in both cases were filed by *Stephen J. Pollak* and *David Rubin* for the National Education Association et al., and by *Samuel Rabinove, Arnold Forster, Paul Hartman, Joseph B. Robison, Beverly Coleman*, and *Elliot Rothenberg* for the American Jewish Committee et al.

The Court's ruling was premised on its determination that the restrictions and state supervision required to guarantee that the specified aid would benefit only the nonreligious activities of the schools would foster "excessive entanglement" between government and religion. *Id.*, at 620–622.

On August 27, 1971, the Pennsylvania General Assembly promulgated a new aid law, entitled the "Parent Reimbursement Act for Nonpublic Education," providing funds to reimburse parents for a portion of tuition expenses incurred in sending their children to nonpublic schools. Shortly thereafter, this suit, challenging the enactment and seeking declaratory and injunctive relief, was filed in the United States District Court for the Eastern District of Pennsylvania. The plaintiffs were Pennsylvania residents and taxpayers who had paid the state tax used to finance the aid program, and at least one plaintiff was also the parent of a child attending a public school within the State. The State Treasurer was named as the defendant and was sued in that capacity. Motions to intervene on the side of the State were granted to a number of parents whose children were enrolled in nonpublic schools and who were therefore entitled to payments under the challenged law.

The defendant and intervenors filed a motion to dismiss the complaint for failure to state a claim upon which relief might be granted. The motion was considered by a properly constituted three-judge District Court. On April 6, 1972, the panel denied the motion in a full opinion explicating its views and holding that the law violated the Establishment Clause. 340 F. Supp. 1356. On the basis of that opinion, the District Court subsequently issued an order granting plaintiffs' motion for summary judgment and permanently enjoining the disbursement of any funds under the Act. Its

order also ruled that the Act could not properly be viewed as containing a separable provision for aid to parents whose children attended *nonsectarian*, nonpublic schools.

Direct appeals were docketed in this Court by the State Treasurer and by the several intervenors.[1] We noted probable jurisdiction, consolidated the appeals for oral argument, and scheduled the cases to be argued with the several appeals in a case from New York involving an issue in common with this case. 410 U. S. 907 (1973). We have today held in *Committee for Public Education & Religious Liberty* v. *Nyquist*, *ante*, p. 756, that New York's tuition reimbursement legislation has the impermissible effect of advancing religious institutions and is therefore unconstitutional under the Establishment Clause. Because we find no constitutionally significant difference between New York's and Pennsylvania's programs, that decision compels our affirmance of the District Court's decision here.

I

Pennsylvania's "Parent Reimbursement Act for Nonpublic Education"[2] provides for reimbursement to parents who pay tuition for their children to attend the State's nonpublic elementary and secondary schools. Qualifying parents are entitled to receive $75 for each dependent enrolled in an elementary school, and $150 for each dependent in a secondary school, unless that amount exceeds the amount of tuition actually paid.

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[1] No. 72–459, *Sloan* v. *Lemon*, is an appeal filed by the State Treasurer and by 12 intervening parents, two of whom are the Watsons—the parents of a child registered in a nonreligious, private school. No. 72–620, *Crouter* v. *Lemon*, is a separately docketed appeal initiated by another one of the intervenors.

[2] Pa. Laws 1971, Act 92, Pa. Stat. Ann., Tit. 24, §§ 5701–5709 (Supp. 1973–1974) (the entire enactment is printed in an appendix to the District Court's opinion, 340 F. Supp. 1356, 1365–1368).

The money to fund this program is to be derived from a portion of the revenues from the State's tax on cigarette sales, and is to be administered by a five-member committee appointed by the Governor, known as the "Pennsylvania Parent Assistance Authority." In an effort to avoid the "entanglement" problem that flawed its prior aid statute, *Lemon* v. *Kurtzman, supra,* the new legislation specifically precludes the administering authority from having any "direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic school or schools." [3] Similarly, the statute imposes no restrictions or limitations on the uses to which the reimbursement allotments can be put by the qualifying parents.

Like the New York tuition program, the Pennsylvania law is prefaced by "legislative findings," which emphasize its underlying secular purposes: parents who send their children to nonpublic schools reduce the total cost of public education; "inflation, plus sharply rising costs of education, now combine to place in jeopardy the ability of such parents fully to carry this burden"; if the State's 500,000 nonpublic school children were to transfer to the public schools, the annual operating costs to the State would be $400 million, and the added capital costs would exceed $1 billion; therefore, "parents who maintain students in nonpublic schools provide a vital service" and deserve at least partial reimbursement for alleviating an otherwise "intolerable public burden." [4] We certainly do not question now, any more than we did two Terms ago in *Lemon* v. *Kurtzman,*[5] the reality and

[3] Act 92, *supra,* § 5704.

[4] *Id.,* § 5702.

[5] These findings are similar to the ones which supported the Pennsylvania teacher-salary reimbursement law involved in *Lemon* v. *Kurtzman.* There the Court noted that the Act was passed "in re-

legitimacy of Pennsylvania's secular purposes. See *Committee for Public Education & Religious Liberty* v. *Nyquist, ante,* at 773.

We turn, then, to consider the new law's effect. As the case was decided in the District Court initially on defendant's and intervenors' motions to dismiss, the court accepted as true plaintiffs' allegation with respect to the identifying characteristics of the schools qualifying under the Act. 340 F. Supp., at 1359. Those characteristics are largely the same as the ones used by the District Court to describe typical sectarian schools in New York. *Ante,* at 767–768. In its subsequent order granting summary judgment in plaintiffs' favor, the District Court indicated that "more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith." App. 87a. This finding is consistent with the evidence in *Lemon* v. *Kurtzman,* in which the Court noted that more than 96% of the children attending nonpublic schools in Pennsylvania in 1969 "attend[ed] church-related schools, and most of these schools are affiliated with the Roman Catholic church." 403 U. S., at 610.

For purposes of determining whether the Pennsylvania tuition reimbursement program has the impermissible effect of advancing religion, we find no constitutionally significant distinctions between this law and the one declared invalid today in *Nyquist.* Each authorizes the States to use tax-raised funds for tuition reimbursements

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sponse to a crisis that the Pennsylvania Legislature found existed in the State's nonpublic schools due to rapidly rising costs." 403 U. S., at 609. The Court held that the State's interest in enhancing "the quality of the secular education in all schools covered by the compulsory attendance laws" was clearly legitimate and "must therefore be accorded appropriate deference." *Id.,* at 613.

payable to parents who send their children to nonpublic schools. Neither tells parents how they must spend the amount received. While the Pennsylvania grants are more generous ($75 to $150 as opposed to $50 to $100), and while Pennsylvania imposes no ceiling on the number of children for whom parents may claim tuition reimbursement or on the percentage of the tuition bill for which parents may be reimbursed,[6] these considerations are irrelevant to the First Amendment question.

Neither the State Treasurer nor appellant-intervenor in No. 72–620 has suggested any way in which the present law might be distinguished from the one in question in *Nyquist*. The intervenors in No. 72–459 have, however, proffered a distinction which deserves discussion because it serves to underline the basis for our ruling in these cases. Intervenors suggest that New York's law might be differentiated on the ground that, because tuition grants there were available only to parents in an extremely low income bracket (less than $5,000 of taxable income), it would be reasonable to predict that the grant would, in fact, be used to pay tuition, rendering the parent a mere "conduit" for public aid to religious schools. Since Pennsylvania authorizes grants to all parents of children in nonpublic schools—regardless of income level—it is argued that no such assumption can be made as to how individual parents will spend their reimbursed amounts.[7]

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[6] Since the grants in this case are not limited to reimbursing only a percentage of the tuition bill, the argument could not be made here that the law contains any "statistical guarantee of neutrality," *Nyquist, ante,* at 787.

[7] Brief for Appellants Diaz et al. 23–24. It was also alleged, as a ground of distinction between the Pennsylvania and New York tuition reimbursement grants, that there was less likelihood of political divisiveness under the Pennsylvania scheme because it is financed out of a self-perpetuating fund derived from the state cigarette tax. Thus, it is contended that no annual appropriations

Our decision, however, is not dependent upon any such speculation. Instead we look to the substance of the program, and no matter how it is characterized its effect remains the same. The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions. We think it plain that this is quite unlike the sort of "indirect" and "incidental" benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the "verge" of the constitutionally impermissible. *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947). In *Lemon* v. *Kurtzman*, we declined to allow *Everson* to be used as the "platform for yet further steps" in granting assistance to "institutions whose legitimate needs are growing and whose interests have substantial political support." 403 U. S., at 624. Again today we decline to approach or overstep the "precipice" against which the Establishment Clause protects. We hold that Pennsylvania's tuition grant scheme violates the constitutional mandate against the "sponsorship" or "financial support" of religion or

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are required and there will be less likelihood of divisive political pressure for increased grants and expanded aid. We addressed the problem of potential political divisiveness in Part III of our opinion in *Nyquist*, *ante*, at 794–798. At most, the difference here is one in degree and one not likely to diminish perceptibly over the long term the inevitable demands for increased and expanded aid.

religious institutions. *Walz* v. *Tax Comm'n*, 397 U. S. 664, 668 (1970).[8]

II

Apart from the Establishment Clause issues central to this case, appellant-intervenors in No. 72–459 make an equal protection claim that was not directly ruled on by the District Court. These intervenors are 12 parents whose children attend nonpublic schools. Two parents, the Watsons, send their child to a nonsectarian school while the remainder send their children to sectarian schools. The District Court's final order enjoined the State Treasurer from disbursing funds to any parents, irrespective of whether their children attended sectarian or nonsectarian schools. The court considered and rejected the argument that the state law should be treated "as containing a separable provision for aid to parents of children attending nonpublic schools that are not church related." [9] Although the Act contained a severability clause,[10] the court reasoned that, in view of the fact that

[8] Appellants have also sought to distinguish *Nyquist* on the ground that Pennsylvania's legislation is more carefully drafted to avoid excessive administrative entanglements; the program is administered by an independent authority rather than by the Commissioner of Education, and its funds are not derived from the general revenues available for education but from a separate fund. Brief for Appellant Diaz et al. 24. Since Pennsylvania's law falls under the second aspect of our test because its effect, inevitably, is to advance religion, we need not address this claimed distinction.

[9] Order of District Court, dated June 20, 1972, scheduling oral arguments on plaintiffs' summary judgment motion and outlining the questions to be argued at that time, reprinted in App. 84a–85a.

[10] "Section 10. Severability.—If a part of this act is invalid, all valid parts *that are severable* from the invalid part remain in effect. If a part of this act is invalid, in one or more of its applications, the part remains in effect in all valid applications *that are severable* from the invalid applications." Pa. Laws 1971, Act 92. (Emphasis supplied.)

so substantial a majority of the law's designated beneficiaries were affiliated with religious organizations, it could not be assumed that the state legislature would have passed the law to aid only those attending the relatively few nonsectarian schools.[11]

Appellants ask this Court to declare the provisions severable and thereby to allow tuition reimbursement for parents of children attending schools that are not church related. If the parents of children who attend nonsectarian schools receive assistance, their argument continues, parents of children who attend sectarian schools are entitled to the same aid as a matter of equal protection. The argument is thoroughly spurious. In the first place, we have been shown no reason to upset the District Court's conclusion that aid to the nonsectarian school could not be severed from aid to the sectarian. The statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted. See *Champlin Refining Co.* v. *Corporation Commission of Oklahoma,* 286 U. S. 210, 234 (1932); cf. *Tilton* v. *Richardson,* 403 U. S. 672, 683–684 (1971) (plurality opinion). Even if the Act were clearly severable, valid aid to nonpublic, nonsectarian schools would provide no lever for aid to their sectarian counterparts. The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution. Having held that tuition reimbursements for the benefit of sectarian schools violate the Establishment Clause, nothing in the Equal Protection Clause will suffice to revive that program. Cf.

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[11] Final Order of District Court, dated July 21, 1972, permanently enjoining enforcement of the Act, reprinted in App. 87a.

Brusca v. *State Board of Education*, 405 U. S. 1050 (1972), aff'g 332 F. Supp. 275 (ED Mo. 1971).

III

In holding today that Pennsylvania's post-*Lemon* v. *Kurtzman* attempt to avoid the Establishment Clause's prohibition against government entanglements with religion has failed to satisfy the parallel bar against laws having a primary effect that advances religion, we are not unaware that appellants and those who have endeavored to formulate systems of state aid to nonpublic education may feel that the decisions of this Court have, indeed, presented them with the "insoluble paradox" to which MR. JUSTICE WHITE referred in his separate opinion in *Lemon* v. *Kurtzman*. 403 U. S., at 668.[12] But if novel forms of aid have not readily been sustained by this Court, the "fault" lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself: "Congress" and the States by virtue of the Fourteenth Amendment "shall make no law respecting an establishment of religion." With that judgment we are not free to tamper, and while there is "room for play in the joints," *Walz* v. *Tax Comm'n*, *supra*, at 669, the Amendment's proscription clearly forecloses Pennsylvania's tuition reimbursement program.

Affirmed.

[For dissenting opinion of THE CHIEF JUSTICE, see *ante*, p. 798.]

[For dissenting opinion of MR. JUSTICE WHITE, see *ante*, p. 813.]

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[12] See also *Lemon* v. *Kurtzman*, 403 U. S., at 640 (DOUGLAS, J., concurring); *Lemon* v. *Kurtzman*, 411 U. S. 192, 203 n. 3 (1973).

ALEXANDER ET AL. *v.* VIRGINIA

CERTIORARI TO THE SUPREME COURT OF VIRGINIA

No. 71–1315. Argued October 19, 1972—Decided June 25, 1973

The judgment of the Supreme Court of Virginia, affirming the trial court's order adjudging certain magazines obscene and restraining their sale, is vacated and remanded for further proceedings consistent with *Miller* v. *California, ante,* p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49; and *Heller* v. *New York, ante,* p. 483. Trial by jury is not constitutionally required in this civil action pursuant to Va. Code Ann. § 18.1–236.3.

212 Va. 554, 186 S. E. 2d 43, vacated and remanded.

Stanley M. Dietz argued the cause and filed a brief for petitioners.

James E. Kulp, Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief were *Andrew P. Miller,* Attorney General, and *Robert E. Shepherd, Jr.,* Assistant Attorney General.*

PER CURIAM.

The judgment of the Supreme Court of Virginia is vacated and the case is remanded for further proceedings not inconsistent with *Miller* v. *California, ante,* at 23–25, *Paris Adult Theatre I* v. *Slaton, ante,* at 58 n. 7, and *Heller* v. *New York, ante,* p. 483. See *United States* v. *12 200-ft. Reels of Film, ante,* at 129–130 and n. 7. A trial by jury is not constitutionally required in this state civil proceeding pursuant to § 18.1–236.3 of the Code of Virginia, 1950, as amended. See *Melancon* v. *McKeithen,* 345 F. Supp. 1025, 1027, 1035–1045, 1048 (ED La.), aff'd *sub nom. Mayes* v. *Ellis,* 409 U. S. 943 (1972), and *Hill* v. *Mc-*

**Ralph J. Schwarz, Jr., Mel S. Friedman,* and *Joel Hirschhorn* filed a brief for the First Amendment Lawyers' Association as *amicus curiae* urging reversal.

Keithen, 409 U. S. 943 (1972). Cf. *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 443–444 (1957).

Vacated and remanded.

MR. JUSTICE DOUGLAS would reverse the judgment of the Supreme Court of Virginia. See *Miller* v. *California*, *ante*, p. 37 (DOUGLAS, J., dissenting).

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

I would reverse the judgment of the Supreme Court of Virginia and remand the case for further proceedings not inconsistent with my dissenting opinion in *Paris Adult Theatre I* v. *Slaton*, *ante*, p. 73. See my dissent in *Miller* v. *California*, *ante*, p. 47.

FAUSNER *v.* COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72–1396. Decided June 25, 1973

Airline pilot taxpayer is not entitled under § 262 of the Internal Revenue Code to an exclusion from "personal" expenses for the costs of commuting by car from his home to his place of employment because by happenstance he must carry incidentals of his occupation with him.

Certiorari granted; 472 F. 2d 561, affirmed.

PER CURIAM.

Petitioner Donald Fausner, a commercial airlines pilot, who regularly traveled by private automobile from his home to his place of employment and back again, a round trip of approximately 84 miles, sought to deduct the entire cost of commuting under § 162 (a) of the Internal Revenue Code of 1954, on the theory that his automobile expenses were incurred to transport his flight bag and overnight bag and thus constituted ordinary and necessary business expenses. It is not disputed that petitioner would have commuted by private automobile regardless of whether he had to transport his two bags. The Tax Court disallowed the deduction *in toto*. On appeal, the Court of Appeals for the Fifth Circuit affirmed the decision of the Tax Court. 472 F. 2d 561.

This issue has been addressed by two other circuits, *Sullivan* v. *Commissioner*, 368 F. 2d 1007 (CA2 1966), and *Tyne* v. *Commissioner*, 385 F. 2d 40 (CA7 1967). Both of these circuits concluded that some allocable portion of the expenses incurred could be deducted as an ordinary and necessary business expense. The Court of Appeals for the Fifth Circuit refused to follow those cases on the

ground that there was no rational basis for any allocation between the nondeductible commuting component and the deductible business component of the total expense.

As the Court of Appeals indicated, Congress has determined that all taxpayers shall bear the expense of commuting to and from work without receiving a deduction for that expense. We cannot read § 262 of the Internal Revenue Code [1] as excluding such expense from "personal" expenses because by happenstance the taxpayer must carry incidentals of his occupation with him. Additional expenses may at times be incurred for transporting job-required tools and material to and from work.[2] Then an allocation of costs between "personal" and "business" expenses [3] may be feasible. But no such allocation can be made here.

We grant the petition for certiorari and affirm the judgment below.

MR. JUSTICE BLACKMUN would grant the petition for a writ of certiorari and set the case for oral argument.

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[1] "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." 26 U. S. C. § 262.

[2] See Rev. Rul. 63–100, 1963–1 Cum. Bull. 34.

[3] Sec. 162 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 162 (a).

Reporter's Note

The next page is purposely numbered 901. The numbers between 839 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS OF JUNE 25, 1973

JUNE 25, 1973

Dismissals Under Rule 60

No. 72–984. GAF CORP. *v.* CIRCLE FLOOR CO., INC., ET AL. C. A. 2d Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 463 F. 2d 752.

No. 72–6640. WALKER *v.* COINER, WARDEN. C. A. 4th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 474 F. 2d 887.

No. 72–6746. JOHNSON *v.* DELAWARE. Sup. Ct. Del. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: —— Del. ——, 305 A. 2d 622.

Affirmed on Appeal

No. 72–166. KELLY ET AL. *v.* BUMPERS, GOVERNOR OF ARKANSAS, ET AL. Affirmed on appeal from D. C. E. D. Ark. Reported below: 340 F. Supp. 568.

No. 72–452. POWELL *v.* WEST, GOVERNOR OF SOUTH CAROLINA, ET AL. Affirmed on appeal from D. C. S. C. MR. JUSTICE DOUGLAS dissents from affirmance.

No. 72–1139. GRIT ET AL. *v.* WOLMAN ET AL. Affirmed on appeal from D. C. S. D. Ohio. For the reasons stated in the dissenting opinions in *Committee for Public Education & Religious Liberty* v. *Nyquist* and companion cases, and *Sloan* v. *Lemon* and companion case, *ante*, pp. 798, 805, 813, MR. JUSTICE WHITE would reverse the judgment of the District Court. Reported below: 353 F. Supp. 744.

No. 72–1170. ELDER *v.* RAMPTON, GOVERNOR OF UTAH, ET AL. Affirmed on appeal from D. C. Utah. MR. JUSTICE DOUGLAS dissents from affirmance.

No. 72–1360. NELSON, ATTORNEY GENERAL OF ARIZONA, ET AL. *v.* MIRANDA ET AL. Appeal from D. C. Ariz. Motion of appellee Miranda for leave to proceed *in forma pauperis* granted. Judgment affirmed. Reported below: 351 F. Supp. 735.

Appeals Dismissed

No. 70–41. MEYER ET AL. *v.* AUSTIN ET AL. Appeal from D. C. M. D. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 319 F. Supp. 457.

No. 72–1026. DURHAM *v.* MCLEOD, ATTORNEY GENERAL OF SOUTH CAROLINA, ET AL. Appeal from Sup. Ct. S. C. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 259 S. C. 409, 192 S. E. 2d 202.

No. 72–1223. DESKINS *v.* KENTUCKY. Appeal from Ct. App. Ky. dismissed for want of substantial federal question. Reported below: 488 S. W. 2d 697.

Reversed on Appeal

No. 72–205. STEVENSON ET AL. *v.* WEST, GOVERNOR OF SOUTH CAROLINA, ET AL. Appeal from D. C. S. C. Judgment reversed. *Swann* v. *Adams*, 385 U. S. 440 (1967); and *Reynolds* v. *Sims*, 377 U. S. 533 (1964).

Vacated and Remanded on Appeal

No. 70–1. GROVE PRESS, INC., ET AL. *v.* FLASK ET AL. Appeal from D. C. N. D. Ohio. Judgment vacated and

case remanded for further consideration in light of *Miller* v. *California, ante,* p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49; *Kaplan* v. *California, ante,* p. 115; *United States* v. *12 200-ft. Reels Film, ante,* p. 123; *United States* v. *Orito, ante,* p. 139; *Heller* v. *New York, ante,* p. 483; *Roaden* v. *Kentucky, ante,* p. 496; and *Alexander* v. *Virginia, ante,* p. 836. MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, would vacate the judgment and remand case for further proceedings not inconsistent with his dissent in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73. See *Miller* v. *California, ante,* p. 47. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this appeal. Reported below: 326 F. Supp. 574.

No. 70–10. FLORIDA EX REL. SHEVIN, ATTORNEY GENERAL OF FLORIDA, ET AL. *v.* M & W THEATRES, INC., ET AL. Appeal from D. C. N. D. Fla. Judgment vacated and case remanded for further consideration in light of *Miller* v. *California, ante,* p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49; *Kaplan* v. *California, ante,* p. 115; *United States* v. *12 200-ft. Reels Film, ante,* p. 123; *United States* v. *Orito, ante,* p. 139; *Heller* v. *New York, ante,* p. 483; *Roaden* v. *Kentucky, ante,* p. 496; and *Alexander* v. *Virginia, ante,* p. 836. MR. JUSTICE DOUGLAS would vacate the judgment and remand case to determine whether after a delay of over three years the case is moot. MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, would vacate the judgment and remand case for further proceedings not inconsistent with his dissent in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73. See *Miller* v. *California, ante,* p. 47.

No. 70–23. THOMPSON ET AL. *v.* UNITED ARTISTS THEATRE CIRCUIT, INC.; and

No. 70–30. UNITED ARTISTS THEATRE CIRCUIT, INC. *v.* THOMPSON ET AL. Appeals from D. C. W. D. Ark.

Judgment vacated and cases remanded for further consideration in light of *Miller* v. *California, ante,* p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49; *Kaplan* v. *California, ante,* p. 115; *United States* v. *12 200-ft. Reels Film, ante,* p. 123; *United States* v. *Orito, ante,* p. 139; *Heller* v. *New York, ante,* p. 483; *Roaden* v. *Kentucky, ante,* p. 496; and *Alexander* v. *Virginia, ante,* p. 836. MR. JUSTICE DOUGLAS would affirm the judgment in No. 70–23. He would reverse the judgment in No. 70–30. See *Miller* v. *California, ante,* p. 37. MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, would vacate the judgment and remand cases for further consideration in light of *Mitchum* v. *Foster,* 407 U. S. 225 (1972). Reported below: 316 F. Supp. 815.

No. 70–24. GROVE PRESS, INC. *v.* BAILEY, SHERIFF. Appeal from D. C. N. D. Ala. Judgment vacated and case remanded for further consideration in light of *Miller* v. *California, ante,* p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49; *Kaplan* v. *California, ante,* p. 115; *United States* v. *12 200-ft Reels Film, ante,* p. 123; *United States* v. *Orito, ante,* p. 139; *Heller* v. *New York, ante,* p. 483; *Roaden* v. *Kentucky, ante,* p. 496; and *Alexander* v. *Virginia, ante,* p. 836. MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, would vacate the judgment and remand case for further consideration in light of *Mitchum* v. *Foster,* 407 U. S. 225 (1972). MR. JUSTICE DOUGLAS took no part in the consideration or decision of this appeal. Reported below: 318 F. Supp. 244.

No. 70–25. SPIVAK *v.* SHRIVER ET AL. Appeal from D. C. M. D. Tenn. Reported below: 315 F. Supp. 695;

No. 71–515. ART THEATER GUILD, INC., DBA STUDIO ART THEATER, ET AL. *v.* TENNESSEE EX REL. RHODES.

Appeal from Sup. Ct. Tenn. Reported below: 225 Tenn. 399, 469 S. W. 2d 669;

No. 71–599. MOTION PICTURE FILM ENTITLED "VIXEN," ET AL. *v.* OHIO EX REL. KEATING. Appeal from Sup. Ct. Ohio. Reported below: 27 Ohio St. 2d 278, 272 N. E. 2d 137;

No. 72–683. WATKINS *v.* SOUTH CAROLINA. Appeal from Sup. Ct. S. C. Reported below: 259 S. C. 185, 191 S. E. 2d 135;

No. 72–815. STAR, DBA GAYETY BOOKS, INC., ET AL. *v.* PRELLER ET AL. Appeal from D. C. Md. Reported below: 352 F. Supp. 530; and

No. 72–1256. BLAIR *v.* OHIO. Appeal from Sup. Ct. Ohio. Reported below: 32 Ohio St. 2d 237, 291 N. E. 2d 451. Motion of appellants to strike appellee's supplemental brief in No. 71–599 denied. Judgments vacated and cases remanded for further consideration in light of *Miller* v. *California, ante,* p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49; *Kaplan* v. *California, ante,* p. 115; *United States* v. *12 200-ft. Reels Film, ante,* p. 123; *United States* v. *Orito, ante,* p. 139; *Heller* v. *New York, ante,* p. 483; *Roaden* v. *Kentucky, ante,* p. 496; and *Alexander* v. *Virginia, ante,* p. 836. MR. JUSTICE DOUGLAS would reverse the judgments. See *Miller* v. *California, ante,* p. 37. MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, would vacate the judgments and remand cases for further proceedings not inconsistent with his dissent in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73. See *Miller* v. *California, ante,* p. 47.

No. 70–35. AUSTIN ET AL. *v.* MEYER ET AL. Appeal from D. C. M. D. Fla. Reported below: 319 F. Supp. 457;

No. 71–304. BYRNE, DISTRICT ATTORNEY OF SUFFOLK

COUNTY *v.* P. B. I. C., INC., ET AL. Appeal from D. C. Mass. Reported below: 313 F. Supp. 757; and

No. 71–1318. DAVIS *v.* PARKER. Appeal from D. C. C. D. Cal. Judgments vacated and cases remanded for further consideration in light of *Miller* v. *California, ante,* p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49; *Kaplan* v. *California, ante,* p. 115; *United States* v. *12 200-ft. Reels Film, ante,* p. 123; *United States* v. *Orito, ante,* p. 139; *Heller* v. *New York, ante,* p. 483; *Roaden* v. *Kentucky, ante,* p. 496; and *Alexander* v. *Virginia, ante,* p. 836. MR. JUSTICE DOUGLAS would affirm the judgments. MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, would vacate the judgments and remand the cases for further proceedings not inconsistent with his dissent in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73. See *Miller* v. *California, ante,* p. 47.

No. 71–1190. SUMMERS ET AL. *v.* CENARRUSA, SECRETARY OF STATE OF IDAHO, ET AL. Appeal from D. C. Idaho. Judgment vacated and case remanded for further consideration in light of *Mahan* v. *Howell,* 410 U. S. 315 (1973); *Gaffney* v. *Cummings,* 412 U. S. 735 (1973); and *White* v. *Regester,* 412 U. S. 755 (1973). Reported below: 342 F. Supp. 288.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

This case should be affirmed. The jurisdictional statement fails to identify any substantial factual or legal error committed by the District Court and does not warrant a remand for further consideration in the light of recently decided reapportionment cases.

Appellants complain of a maximum total deviation of 19.41% from the ideal population figure, resulting from one district's allegedly being 10.62% overrepresented and

another 8.79% underrepresented (appellants assert the deviations actually were 10.57% overrepresentation and 8.88% underrepresentation, with a total variation of 19.45%). The jurisdictional statement asserts that the 10.62% overrepresentation exists in District No. 22 and that it was sought to be justified by the State on the grounds that the population of Mountain Home Air Force Base, located in the District, had increased by 2,000 since the 1970 census, that an irrigation project would cause further population growth in the District, and that detaching certain areas from a particular county was undesirable.

The appellants assert, in conclusory manner, that "the population growth at Mountain Home Air Force Base is disputed" and that "the anticipated growth in population was not predicted with a high degree of accuracy." The District Court, however, accepted the justification, specifically referring to increases in population as being among the justifications offered for various population deviations. 342 F. Supp. 288, 289 (Idaho 1972). In any event, I find no basis in the jurisdictional statement for our disagreeing with the District Court or with the legislature. If there had been a 2,000 increase in population since 1970 the legislature was quite right in taking it into account, and the alleged deviation disappears. Also, if population increases were correctly anticipated, they need not have been ignored.

The alleged underrepresentation is claimed to exist in District No. 28 because of improper exclusion from the population count of "out-of-state and foreign students" attending a private college within the District. Appellants complain that there should have been more effort to determine whether each individual student so excluded had in fact satisfied the residence requirements for voting. The District Court noted and accepted the

justifying factor of the "exclusion of non-resident college students, which were included in the 1970 census." *Id.*, at 289. There is no basis for upsetting the legislative estimate as to how many students at this particular college should be treated as nonresident, nonvoting persons making up part of the 1970 census count. Thus, again, appellants fail to present a sound reason for overturning the judgment of the District Court.

The jurisdictional statement does not specify the extent of the deviation in any other specific district. It is said that "11 legislative districts are underrepresented by 3 percent or more" and that "7 legislative districts are overrepresented by 3 percent or more." But the extent of the deviation in any district is not presented; there is no indication that the deviation in any particular district would exceed those that are permissible without further justification. *Gaffney* v. *Cummings*, 412 U. S. 735 (1973), and *White* v. *Regester*, 412 U. S. 755 (1973).

Finally, appellants assert that Custer County should have been included in District No. 9 rather than in District No. 20 and that it is no excuse that a wilderness area separated Custer County from the main population centers of District No. 9. Again, however, appellants give no indication of whether or to what extent either District No. 9 or District No. 20 varied in population from the ideal district.

Insofar as can be ascertained from the jurisdictional statement, therefore, it appears that maintaining county or other local subdivision lines had very little to do with any of the population deviations in specific districts that are challenged by appellants. Appellants have not presented a case that warrants a remand in light of *Mahan* v. *Howell*, 410 U. S. 315 (1973), *Gaffney*, or *White*.

No. 72–76. FORTSON, SECRETARY OF STATE OF GEORGIA *v.* MILLICAN ET AL. Appeal from D. C. N. D. Ga. Judgment vacated and case remanded for further consideration in light of *Gaffney* v. *Cummings*, 412 U. S. 735 (1973); and *White* v. *Regester*, 412 U. S. 755 (1973). Reported below: 351 F. Supp. 447.

No. 72–853. UNITED STATES *v.* B & H DIST. CORP. ET AL. Appeal from D. C. W. D. Wis. Judgment vacated and case remanded for further consideration in light of *Miller* v. *California*, *ante*, p. 15; *Paris Adult Theatre I* v. *Slaton*, *ante*, p. 49; *Kaplan* v. *California*, *ante*, p. 115; *United States* v. *12 200-ft. Reels Film*, *ante*, p. 123; *United States* v. *Orito*, *ante*, p. 139; *Heller* v. *New York*, *ante*, p. 483; *Roaden* v. *Kentucky*, *ante*, p. 496; and *Alexander* v. *Virginia*, *ante*, p. 836. MR. JUSTICE DOUGLAS would affirm. MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, dissents and would affirm the judgment of dismissal of the indictment charging appellees with a violation of 18 U. S. C. § 1462. See *Miller* v. *United States*, *ante*, p. 47. Reported below: 347 F. Supp. 905.

No. 72–932. BIGELOW *v.* VIRGINIA. Appeal from Sup. Ct. Va. Judgment vacated and case remanded for further consideration in light of *Roe* v. *Wade*, 410 U. S. 113 (1973); and *Doe* v. *Bolton*, 410 U. S. 179 (1973).

No. 72–1053. MICHIGAN *v.* BLOSS ET AL. Appeal from Sup. Ct. Mich. Judgment vacated and case remanded for further consideration in light of *Miller* v. *California*, *ante*, p. 15; *Paris Adult Theatre I* v. *Slaton*, *ante*, p. 49; *Kaplan* v. *California*, *ante*, p. 115; *United States* v. *12 200-ft. Reels Film*, *ante*, p. 123; *United States* v. *Orito*, *ante*, p. 139; *Heller* v. *New York*, *ante*, p. 483; *Roaden* v. *Kentucky*, *ante*, p. 496; and *Alexander* v. *Virginia*,

ante, p. 836. MR. JUSTICE DOUGLAS would dismiss the appeal for want of a substantial federal question. Reported below: 388 Mich. 409, 201 N. W. 2d 806.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, dissenting.

In these criminal prosecutions for the sale of certain allegedly obscene publications in violation of Mich. Stat. Ann. § 28.575 (1), the Supreme Court of Michigan reversed the convictions on the ground that suppression of sexually oriented expression cannot be reconciled with the guarantees of the First Amendment in the absence of evidence that the materials were distributed to juveniles or offensively exposed to unconsenting adults. In recognizing this limitation on state power the Michigan Supreme Court adopted an approach consistent with the one I have urged today. See *Paris Adult Theatre I* v. *Slaton*, *ante*, p. 73. Accordingly, I would dismiss the appeal for want of a substantial federal question, or if the jurisdictional statement be treated as a petition for certiorari, would deny the petition.

No. 72–5939. JIMERSON ET AL. *v.* NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES ET AL. Appeal from D. C. W. D. N. Y. Motion for leave to proceed *in forma pauperis* granted. Judgment vacated and case remanded for further consideration in light of *New York Dept. of Social Services* v. *Dublino*, *ante*, p. 405. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 348 F. Supp. 290.

Certiorari Granted—Affirmed. (See No. 72–1396, *ante*, p. 838.)

Certiorari Granted—Vacated and Remanded

In each of the following cases (beginning with No. 71–411 on p. 911 and extending through No. 72–1330 on p. 913), certiorari is granted, the judgment is vacated,

and the case is remanded for further consideration in light of *Miller* v. *California, ante,* p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49; *Kaplan* v. *California, ante,* p. 115; *United States* v. *12 200-ft. Reels Film, ante,* p. 123; *United States* v. *Orito, ante,* p. 139; *Heller* v. *New York, ante,* p. 483; *Roaden* v. *Kentucky, ante,* p. 496; and *Alexander* v. *Virginia, ante,* p. 836. MR. JUSTICE DOUGLAS in each case would grant certiorari and reverse the judgment. See *Miller* v. *California, ante,* p. 37. MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, in each case would grant certiorari, vacate the judgment, and remand the case for further proceedings not inconsistent with his dissent in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73. See *Miller* v. *California, ante,* p. 47.

No. 71–411. COURT *v.* WISCONSIN. Sup. Ct. Wis. Reported below: 51 Wis. 2d 683, 188 N. W. 2d 475;

No. 71–701. REITANO *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Orange;

No. 71–739. VILLAGE BOOKS, INC., ET AL. *v.* MARSHALL, STATE'S ATTORNEY FOR PRINCE GEORGES COUNTY. Ct. App. Md. Reported below: 263 Md. 76, 282 A. 2d 126;

No. 71–773. ADULT BOOK STORE ET AL. *v.* SENSENBRENNER, MAYOR OF COLUMBUS. Sup. Ct. Ohio. Reported below: See 26 Ohio App. 2d 183, 271 N. E. 2d 13;

No. 71–844. MARKS ET AL. *v.* CITY OF NEWPORT. Ct. App. Ky.;

No. 71–984. WASSERMAN *v.* MUNICIPAL COURT OF ALHAMBRA JUDICIAL DISTRICT. C. A. 9th Cir. Reported below: 449 F. 2d 787;

No. 71–1201. STROUD *v.* INDIANA. Sup. Ct. Ind. Reported below: 257 Ind. 204, 273 N. E. 2d 842;

No. 71–1347. MOHNEY *v.* INDIANA. Sup. Ct. Ind. Reported below: 257 Ind. 394, 276 N. E. 2d 517;

No. 71–1368. BROWN *v.* UNITED STATES. C. A. 4th Cir.;

No. 71–1458. MITCHUM *v.* TENNESSEE. Ct. Crim. App. Tenn.;

No. 71–1464. JOHNSON ET AL. *v.* KENTUCKY. Ct. App. Ky. Reported below: 475 S. W. 2d 893;

No. 71–1587. TOBALINA *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles;

No. 71–1641. ADLER ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Sacramento. Reported below: 25 Cal. App. 3d Supp. 24, 101 Cal. Rptr. 726;

No. 71–1674. GETMAN ET AL. *v.* MINNESOTA. Sup. Ct. Minn. Reported below: 293 Minn. 11, 195 N. W. 2d 827;

No. 71–1702. P. A. J. THEATRES CORP. *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept.;

No. 72–124. RIDENS ET AL. *v.* ILLINOIS ET AL. Sup. Ct. Ill. Reported below: 51 Ill. 2d 410, 282 N. E. 2d 691;

No. 72–172. KNOXVILLE BOOKMART, INC., ET AL. *v.* TENNESSEE EX REL. WEBSTER, DISTRICT ATTORNEY GENERAL. Sup. Ct. Tenn.;

No. 72–357. PRICE *v.* VIRGINIA. Sup. Ct. Va. Reported below: 213 Va. 113, 189 S. E. 2d 324;

No. 72–538. ALBINI ET AL. *v.* OHIO ET AL. Sup. Ct. Ohio. Reported below: 31 Ohio St. 2d 27, 285 N. E. 2d 327;

No. 72–539. MACKEN ET AL. *v.* OHIO ET AL. Ct. App. Ohio, Summit County;

No. 72–558. ELSTER *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of San Francisco;

No. 72–569. GOLDSTEIN *v.* VIRGINIA. Sup. Ct. Va.;

No. 72–591. KEITH *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles;

No. 72–859. YANNUCCI *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 2d & 11th Jud. Dists.;

No. 72–872. G. I. DISTRIBUTORS, INC., ET AL. *v.* MURPHY, POLICE COMMISSIONER OF CITY OF NEW YORK, ET AL. C. A. 2d Cir. Reported below: 469 F. 2d 752;

No. 72–918. LITTLE *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Orange;

No. 72–961. DE SANTIS *v.* NEW JERSEY. Super. Ct. N. J.;

No. 72–994. WINSLOW *v.* VIRGINIA. Sup. Ct. Va.;

No. 72–1062. TOUTANT *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of San Bernardino;

No. 72–1071. KUHNS ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Cruz;

No. 72–1072. CASTNER ET AL. *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Santa Cruz;

No. 72–1221. GULF STATES THEATRES OF LOUISIANA, INC., ET AL. *v.* LOUISIANA ET AL. Sup. Ct. La. Reported below: 270 So. 2d 547; and

No. 72–1330. BRYANT ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Reported below: 16 N. C. App. 456, 192 S. E. 2d 693.

No. 70–43. MILLER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Reported below: 431 F. 2d 655;

No. 71–40. KAPLAN *v.* UNITED STATES. Ct. App. D. C. Reported below: 277 A. 2d 477;

No. 71–182. EWING, DBA ACTION PUBLISHING CO. *v.* UNITED STATES. C. A. 10th Cir. Reported below: 445 F. 2d 945;

No. 71–1517. MILLER *v.* UNITED STATES. C. A. 9th Cir. Reported below: 455 F. 2d 899; and

No. 72–154. CANGIANO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Reported below: 475 F. 2d 1393. Certiorari granted, judgments vacated, and cases remanded to the respective United States Courts of Appeals for further consideration in light of *Miller* v. *California, ante,* p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49;

Kaplan v. *California, ante,* p. 115; *United States* v. *12 200-ft. Reels Film, ante,* p. 123; *United States* v. *Orito, ante,* p. 139; *Heller* v. *New York, ante,* p. 483; *Roaden* v. *Kentucky, ante,* p. 496; and *Alexander* v. *Virginia, ante,* p. 836. MR. JUSTICE DOUGLAS would grant certiorari and reverse the judgments. See *Miller* v. *California, ante,* p. 37.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, dissenting.

Miller v. *United States,* No. 70–43, involves convictions under 18 U. S. C. §§ 1461 and 1462. *Kaplan* v. *United States,* No. 71–40, involves a conviction under D. C. Code Ann. § 22–2001 (Supp. III, 1970). *Ewing* v. *United States,* No. 71–182, and *Miller* v. *United States,* No. 71–1517, involve convictions under 18 U. S. C. § 1461. *Cangiano* v. *United States,* No. 72–154, involves convictions under 18 U. S. C. § 1465. Under the view expressed in my dissent in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73, it is clear that the statutes involved in these cases cannot stand. Whatever the extent of the Federal Government's power to bar the distribution of allegedly obscene material to juveniles or the offensive exposure of such material to unconsenting adults, each of these statutes is clearly overbroad and unconstitutional on its face. See my dissents in *Miller* v. *California, ante,* p. 47, and *United States* v. *Orito, ante,* p. 147. I would therefore grant the petition for certiorari in each case and reverse each judgment of conviction.

No. 71–1353. ROMANUS ET AL. *v.* CALIFORNIA. Ct. App. Cal., App. Dist.; and

No. 71–6287. GOWER *v.* UNITED STATES. C. A. D. C. Cir. Motions to dispense with printing petitions granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Miller* v.

California, ante, p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49; *Kaplan* v. *California, ante,* p. 115; *United States* v. *12 200-ft. Reels Film, ante,* p. 123; *United States* v. *Orito, ante,* p. 139; *Heller* v. *New York, ante,* p. 483; *Roaden* v. *Kentucky, ante,* p. 496; and *Alexander* v. *Virginia, ante,* p. 836. MR. JUSTICE DOUGLAS would grant certiorari and reverse the judgment in each case. See *Miller* v. *California, ante,* p. 37. MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, would grant certiorari, vacate the judgments, and remand cases for further proceedings not inconsistent with his dissent in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73. See *Miller* v. *California, ante,* p. 47.

No. 71–728. DAVISON *v.* FLORIDA. Sup. Ct. Fla. Reported below: 251 So. 2d 841; and

No. 72–1120. COTE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 470 F. 2d 755. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Miller* v. *California, ante,* p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49; *Kaplan* v. *California, ante,* p. 115; *United States* v. *12 200-ft. Reels Film, ante,* p. 123; *United States* v. *Orito, ante,* p. 139; *Heller* v. *New York, ante,* p. 483; *Roaden* v. *Kentucky, ante,* p. 496; and *Alexander* v. *Virginia, ante,* p. 836. MR. JUSTICE DOUGLAS would grant certiorari and reverse the judgment in each case. See *Miller* v. *California, ante,* p. 37. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would deny certiorari.

No. 71–1293. FOERSTER *v.* UNITED STATES. C. A. 9th Cir. Reported below: 455 F. 2d 981; and

No. 72–5329. BOWEN *v.* UNITED STATES. C. A. 9th Cir. Reported below: 462 F. 2d 347. Motion of petitioner in No. 72–5329 for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments va-

cated, and cases remanded for further consideration in light of *Almeida-Sanchez* v. *United States, ante,* p. 266.

No. 72–190. SMITH ET AL. *v.* BOARD OF EDUCATION, INDEPENDENT SCHOOL DISTRICT No. 1, TULSA COUNTY, OKLAHOMA, ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Keyes* v. *School District No. 1, ante,* p. 189. MR. JUSTICE WHITE took no part in the consideration or decision of this case. Reported below: 459 F. 2d 720.

No. 72–1446. UNITED STATES *v.* PALLADINO ET AL. C. A. 1st Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Miller* v. *California, ante,* p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49; *Kaplan* v. *California, ante,* p. 115; *United States* v. *12 200-ft. Reels Film, ante,* p. 123; *United States* v. *Orito, ante,* p. 139; *Heller* v. *New York, ante,* p. 483; *Roaden* v. *Kentucky, ante,* p. 496; and *Alexander* v. *Virginia, ante,* p. 836. MR. JUSTICE DOUGLAS would deny certiorari. MR. JUSTICE BRENNAN, joined by MR. JUSTICE STEWART and MR. JUSTICE MARSHALL, would grant the petition, vacate the judgment, and remand case for further proceedings not inconsistent with his dissent in *Paris Adult Theatre I* v. *Slaton, ante,* p. 73. See *Miller* v. *California, ante,* p. 47. Reported below: 475 F. 2d 65.

Miscellaneous Orders

No. A–1164. MARBURGER, COMMISSIONER OF EDUCATION OF NEW JERSEY, ET AL. *v.* PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY ET AL. D. C. N. J. Application for stay of injunction heretofore granted by this Court on May 29, 1973 [412 U. S. 916], vacated. For the reasons stated in the dissenting opinions in *Committee for Public Education & Religious Liberty* v. *Ny-*

quist, and companion cases, and *Sloan* v. *Lemon*, and companion case, *ante*, pp. 798, 805, 813, THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST dissent from the vacation of stay of the District Court's preliminary injunction. Reported below: 358 F. Supp. 29.

No. A–1220 (72–6675). LEAMER *v.* DERAMUS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Application for bail denied.

No. A–1233 (72–6900). DOE *v.* PLANNED PARENTHOOD ASSOCIATION OF UTAH. Appeal from Sup. Ct. Utah. Application for stay presented to MR. JUSTICE BRENNAN, and by him referred to the Court, denied. Reported below: 29 Utah 2d 356, 510 P. 2d 75.

No. A–1234 (72–562). ABERDEEN & ROCKFISH RAILROAD CO. ET AL. *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL.; and

No. A–1239 (72–535). INTERSTATE COMMERCE COMMISSION *v.* STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (SCRAP) ET AL. D. C. D. C. Application of SCRAP et al. to vacate stay entered by THE CHIEF JUSTICE on June 8, 1973, denied. MR. JUSTICE DOUGLAS would vacate the stay. MR. JUSTICE POWELL took no part in the consideration or decision of this application.

No. A–1260 (72–6871). BELL *v.* UNITED STATES. C. A. 7th Cir. Application for stay presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 476 F. 2d 1046.

No. A–1273 (72–1712). IN RE HOROWITZ. C. A. 2d Cir. Application for stay presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN would grant the application. Reported below: 482 F. 2d 72.

No. 36, Orig. TEXAS *v.* LOUISIANA. Motion of the State of Louisiana to enlarge the reference to the Special Master to fix the extension of Louisiana's island boundary into the Gulf of Mexico between Louisiana, Texas, and the United States to the extent of Louisiana's title under the Submerged Lands Act, or other alternative relief, is referred to the Special Master. The Solicitor General is invited to file a brief expressing the views of the United States. In due course, after receipt of the brief of the United States, the Special Master shall submit his report to the Court on the motion. [See 410 U. S. 702.]

No. 64, Orig. NEW HAMPSHIRE *v.* MAINE. Motion for preliminary injunction denied. MR. JUSTICE DOUGLAS and MR. JUSTICE BLACKMUN would grant the motion conditioned upon the imposition upon all fishermen operating in the disputed area of the more onerous of the conditions presently imposed by either New Hampshire or Maine.

No. 72–955. SPOMER, STATE'S ATTORNEY OF ALEXANDER COUNTY, ILLINOIS *v.* LITTLETON ET AL. C. A. 7th Cir. [Certiorari granted, 411 U. S. 915.] Motion of the Attorney General of California for leave to participate in oral argument as *amicus curiae* and for additional time for oral argument denied.

No. 72–1513. SHEA, EXECUTIVE DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF COLORADO, ET AL. *v.* VIALPANDO. C. A. 10th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Reported below: 475 F. 2d 731.

No. 72–1613. HUFFMAN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO ET AL. Application for stay or writ of injunction presented to MR. JUSTICE STEWART, and by him referred to the Court,

and the motion to advance, denied. Motion of Pursue, Ltd., to participate as a party respondent granted.

Certiorari Granted

No. 72–914. SCHEUER, ADMINISTRATRIX *v.* RHODES, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Certiorari granted and case set for oral argument with No. 72–1318 [immediately *infra*]. Reported below: 471 F. 2d 430.

No. 72–1318. KRAUSE, ADMINISTRATOR, ET AL. *v.* RHODES, GOVERNOR OF OHIO, ET AL. C. A. 6th Cir. Certiorari granted and case set for oral argument with No. 72–914 [immediately *supra*]. Reported below: 471 F. 2d 430.

Certiorari Denied. (See also No. 70–41, *supra*).

No. 71–1240. BIRD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 456 F. 2d 1023.

No. 71–6355. BAMBERGER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 456 F. 2d 1119.

No. 71–6579. SHEFFIELD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 458 F. 2d 1049.

No. 71–6812. REED *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 460 F. 2d 1277.

No. 71–6879. SCHLOMANN *v.* MOSELEY, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 457 F. 2d 1223.

No. 72–84. MCDANIEL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 463 F. 2d 129.

No. 72–341. GUINN, SUPERINTENDENT OF SCHOOLS, ET AL. *v.* KELLY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 456 F. 2d 100.

No. 72–667. SCHOOL BOARD OF THE CITY OF NEWPORT NEWS, VIRGINIA, ET AL. *v.* THOMPSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 465 F. 2d 83.

No. 72–668. CISNEROS ET AL. *v.* CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 467 F. 2d 142.

No. 72–1197. BARRON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 472 F. 2d 1215.

No. 72–1450. BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 474 F. 2d 81.

No. 72–5367. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 467 F. 2d 630.

No. 72–5379. BRANDON *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. Reported below: 461 F. 2d 764.

No. 72–5480. CONWAY *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 15 Md. App. 198, 289 A. 2d 862.

No. 72–6057. GREELEY *v.* UNITED STATES; and
No. 72–6299. GREELEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 471 F. 2d 25.

No. 72–6099. SINGLETON *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 210 Kan. 815, 504 P. 2d 224.

No. 72–6101. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 470 F. 2d 858.

No. 72–6185. SEARCY *v.* PINNOCK. C. A. 9th Cir. Certiorari denied.

No. 72–6265. CLAYTON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 72–6310. WIMBERLEY *v.* RICHARDSON, SECRETARY OF DEFENSE, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 472 F. 2d 923.

No. 72–6396. SCRUGGS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 473 F. 2d 911.

No. 71–572. SCHOOL DISTRICT No. 1, DENVER, COLORADO, ET AL. *v.* KEYES ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Reported below: 445 F. 2d 990.

No. 72–48. LAWLOR ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 458 F. 2d 660.

No. 72–1023. THOMAS *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 72–1316. SWINNEY *v.* UNTREINER, SHERIFF, ET AL. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 272 So. 2d 805.

No. 72–5375. MARQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 462 F. 2d 620.

No. 72–5998. COLEMAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 298 A. 2d 40.

No. 72–6377. HOLT, AKA SUMMERS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 28 Cal. App. 3d 343, 104 Cal. Rptr. 572.

No. 72–385. TATE EDUCATIONAL FOUNDATION, INC. *v.* MCNEAL ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 460 F. 2d 568.

No. 72–835. PETTIBONE, DIRECTOR, DIVISION OF PAROLE AND PROBATION, DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES OF MARYLAND *v.* WOODALL. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 465 F. 2d 49.

No. 72–1187. COMBS, SUPERINTENDENT, GRAND PRAIRIE INDEPENDENT SCHOOL DISTRICT, ET AL. *v.* JOHNSON ET AL. C. A. 5th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 471 F. 2d 84.

No. 72–1473. UNITED STATES *v.* ROTHFELDER. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 474 F. 2d 606.

No. 72–1474. UNITED STATES *v.* KING. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 474 F. 2d 1343.

No. 72–649. CORPUS CHRISTI INDEPENDENT SCHOOL DISTRICT ET AL. *v.* CISNEROS ET AL. C. A. 5th Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE STEWART, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST, feeling that no useful purpose is to be served by setting the case for oral argument, would nevertheless grant the petition, vacate the judgment, and remand case for further consideration in light of *Keyes* v. *School District No. 1, ante,* p. 189. Reported below: 467 F. 2d 142.

No. 72–739. BOARD OF EDUCATION OF THE LITTLE ROCK SCHOOL DISTRICT ET AL. *v.* CLARK ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 465 F. 2d 1044.

No. 72–5348. COOLEY *v.* STRICKLAND TRANSPORTATION CO. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari and reverse the judgment. Reported below: 459 F. 2d 779.

Rehearing Denied

No. 71–1664. ESSEX, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL. *v.* WOLMAN ET AL., 409 U. S. 808. Motion for leave to file petition for rehearing denied.

No. 72–146. HUNTER, DBA COURIER *v.* UNITED STATES, 409 U. S. 934. Motion for leave to file petition for rehearing denied. MR. JUSTICE DOUGLAS, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN would grant the motion.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1970, 1971, AND 1972

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1970	1971	1972	1970	1971	1972	1970	1971	1972	1970	1971	1972
Number of cases on dockets	20	18	21	1, 903	2, 070	2, 183	2, 289	2, 445	2, 436	4, 212	4, 533	4, 640
Number disposed of during terms	7	8	8	1, 541	1, 628	1, 771	1, 774	2, 009	1, 969	3, 322	3, 645	3, 748
Number remaining on dockets	13	10	13	362	442	412	515	436	467	890	888	892

	TERMS		
	1970	1971	1972
Cases argued during term	151	[1] 177	177
Number disposed of by full opinions	126	143	159
Number disposed of by per curiam opinions	22	[2] 24	18
Number set for reargument	3	[3] 9	0
Cases granted review this term	161	[4] 163	154
Cases reviewed and decided without oral argument	192	286	265
Total cases to be available for argument at outset of following term	107	99	76

[1] Includes No. 9 Orig. (pending)
[2] Includes A–483 and No. 50 Orig.
[3] Includes 4 which were argued in O.T. 1971
[4] Includes A–483 and No. 9 Orig.

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I. Commerce Clause.

1. *Obscenity—Importation of contraband.*—Congress, which has broad powers under the Commerce Clause to prohibit importation into this country of contraband, may constitutionally proscribe the importation of obscene matter, notwithstanding that the material is for the importer's private, personal use and possession. United States v. 12 200-ft. Reels Film, p. 123.

2. *Obscenity—Privacy.*—Congress has the power to prevent obscene material, which is not protected by the First Amendment, from entering the stream of commerce. The zone of privacy that *Stanley* v. *Georgia,* 394 U. S. 557, protected does not extend beyond the home. United States v. Orito, p. 139.

II. Due Process.

1. *Food Stamp Act—Tax deductions.*—Tax deduction taken for benefit of parent in a prior year is not a rational measure of need of a different household with which the child of the tax-deducting parent lives, and the administration of the Act allows no hearing to show that the tax deduction is irrelevant to the need of the household. Section 5 (b) of the Act therefore violates due process. U. S. Dept. of Agriculture v. Murry, p. 508.

CONSTITUTIONAL LAW—Continued.

2. *Food Stamp Act—Unrelated persons.*—The legislative classification here involved, excluding households whose members are not "all related to each other," cannot be sustained, the classification being clearly irrelevant to stated purposes of the Act and not rationally furthering any other legitimate governmental interest. In practical operation, the Act excluded not those who are "likely to abuse the program" but, rather, only those who so desperately need aid that they cannot even afford to alter their living arrangements so as to retain their eligibility. U. S. Dept. of Agriculture v. Moreno, p. 528.

III. Equal Protection of the Laws.

1. *Admission to the bar—Aliens.*—Connecticut's exclusion of aliens from practice of law violates the Equal Protection Clause of the Fourteenth Amendment. Classifications based on alienage, being inherently suspect, are subject to close judicial scrutiny, and here the State through appellee bar committee has not met burden of showing the classification to have been necessary to vindicate State's undoubted interest in maintaining high professional standards. In re Griffiths, p. 717.

2. *Establishment Clause—Aid to sectarian schools.*—Pennsylvania's Parent Reimbursement Act for Nonpublic Education is not severable, but even if it were clearly severable, valid aid to nonpublic, nonsectarian schools can provide no basis for sustaining aid to sectarian schools. The Equal Protection Clause cannot be relied upon to sustain a program violative of the Establishment Clause. Sloan v. Lemon, p. 825.

3. *Mississippi textbook loan program—Private schools.*—Private schools have the right to exist and to operate, but the State is not required by the Equal Protection Clause to provide assistance to private schools equal to that it provides to public schools without regard to whether private schools discriminate on racial grounds. Norwood v. Harrison, p. 455.

4. *Mississippi textbook loan program—Tangible school assistance.*—Free textbooks, like tuition grants directed to students in private schools, are a form of tangible financial assistance benefiting schools themselves, and the State's constitutional obligation requires it to avoid not only operating old dual system of racially segregated schools but also providing tangible aid to schools that practice racial or other invidious discrimination. Norwood v. Harrison, p. 455.

5. *New York Civil Service Law—Citizenship.*—Section 53 of the Law violates the Equal Protection Clause of the Fourteenth Amendment since, in the context of New York's statutory civil service scheme, it sweeps indiscriminately and is not narrowly limited to the

CONSTITUTIONAL LAW—Continued.
accomplishment of substantial state interests. The "special public interest" doctrine has no applicability to this case. Sugarman v. Dougall, p. 634.

IV. First Amendment.

1. *Commercial advertising—Freedom of expression.*—The advertisements here, which did not implicate the newspaper's freedom of expression or its financial viability, were "purely commercial advertising," which is not protected by the First Amendment. Pittsburgh Press Co. v. Human Rel. Comm'n, p. 376.

2. *Commercial speech—Employment discrimination.*—Petitioner's argument against maintaining the *Valentine* v. *Chrestensen*, 316 U. S. 52, distinction between commercial and other speech is unpersuasive in the context of a case like this, where the regulation of the want ads was incidental to and coextensive with the regulation of employment discrimination. Pittsburgh Press Co. v. Human Rel. Comm'n, p. 376.

3. *Establishment Clause—Aid to nonpublic schools—Legislative purpose.*—The propriety of legislature's purpose may not immunize from further scrutiny a law that either has a primary effect that advances religion, or that fosters excessive Church-State entanglement. Committee for Public Education v. Nyquist, p. 756.

4. *Establishment Clause—Entanglement with religion.*—Because the challenged sections of New York law have the impermissible effect of advancing religion, it is not necessary to consider whether such aid would yield an entanglement with religion. But it should be noted that assistance of the sort involved here carries grave potential for entanglement in the broader sense of continuing and expanding political strife over aid to religion. Committee for Public Education v. Nyquist, p. 756.

5. *Establishment Clause—Maintenance and repair of nonpublic schools.*—Maintenance and repair provisions of New York statute violate the Establishment Clause because their inevitable effect is to subsidize and advance the religious mission of sectarian schools. This section does not properly guarantee the secularity of state aid by limiting the percentage of assistance to 50% of comparable aid to public schools. Such statistical assurances fail to provide an adequate guarantee that aid will not be utilized to advance the religious activities of sectarian schools. Committee for Public Education v. Nyquist, p. 756.

CONSTITUTIONAL LAW—Continued.

6. *Establishment Clause—Mississippi textbook loan program.*—Assistance carefully limited so as to avoid prohibitions of the "effect" and "entanglement" tests may be confined to the secular functions of sectarian schools and does not substantially promote religious mission of those schools in violation of the Establishment Clause. In this case, however, legitimate educational function of private discriminatory schools cannot be isolated from their alleged discriminatory practices; discriminatory treatment exerts pervasive influence on entire educational process. Establishment Clause permits greater degree of state assistance to sectarian schools than may be given to private schools which engage in discriminatory practices. Norwood v. Harrison, p. 455.

7. *Establishment Clause—New York's plan to reimburse nonpublic schools.*—New York's statute constitutes an impermissible aid to religion contravening the Establishment Clause, since no attempt is made and no means are available to assure that internally prepared tests, which are "an integral part of the teaching process," are free of religious instruction and avoid inculcating students in the religious precepts of the sponsoring church. Levitt v. Committee for Public Education, p. 472.

8. *Establishment Clause—New York's plan to reimburse private schools.*—The inquiry is not whether the State should be permitted to pay for any "mandated" activity, but whether the challenged state aid has the primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the affairs of religious institutions. Levitt v. Committee for Public Education, p. 472.

9. *Establishment Clause—Reimbursement of nonpublic school tuition.*—There is no constitutionally significant difference between Pennsylvania's tuition grant scheme, with its intended consequence of preserving and supporting religion-oriented institutions, and New York's tuition reimbursement program held violative of the Establishment Clause in *Committee for Public Education* v. *Nyquist, ante,* p. 756. Sloan v. Lemon, p. 825.

10. *Establishment Clause—Reimbursing private schools for "secular" services.*—The Act provides only for a single per-pupil allotment for a variety of services, some secular and some potentially religious, and the courts cannot properly reduce that allotment to correspond to the actual costs of performing reimbursable secular services, as that is a legislative and not a judicial function. Levitt v. Committee for Public Education, p. 472.

CONSTITUTIONAL LAW—Continued.

11. *Establishment Clause—South Carolina Educational Facilities Act.*—The Act, as construed by the South Carolina Supreme Court, does not, under guidelines of *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613, violate the Establishment Clause. The purpose of the Act is secular, the benefits of the statute being available to all institutions of higher learning in the State, whether or not they have a religious affiliation. The Act does not have the primary effect of advancing or inhibiting religion. The college involved has no significant sectarian orientation and the project must be confined to a secular purpose, with the lease agreement, enforced by inspection provisions, forbidding religious use. Hunt v. McNair, p. 734.

12. *Establishment Clause—South Carolina Educational Facilities Act—Entanglement with religion.*—The Act does not foster an excessive entanglement with religion. The record here does not show that religion so permeates the college that inspection by the Educational Facilities Authority to insure that the project is not used for religious purposes would necessarily lead to such entanglement. Authority's power to participate in certain management decisions also does not have that effect, in view of narrow construction by State Supreme Court, limiting such power to insuring that college's fees suffice to meet bond payments. Absent default, lease agreement would leave full responsibility with college regarding fees and general operations. Hunt v. McNair, p. 734.

13. *Establishment Clause—Tax benefits to parents of nonpublic school students.*—System of providing income tax benefits to parents of children attending New York's nonpublic schools violates the Establishment Clause because, like tuition reimbursement program, it is not sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools. Committee for Public Education v. Nyquist, p. 756.

14. *Establishment Clause—Tuition reimbursement grants.*—Tuition reimbursement grants, if given directly to sectarian schools, would violate the Establishment Clause, and the fact that they are delivered to parents rather than the schools does not compel a contrary result, as the effect of the aid is unmistakably to provide financial support for nonpublic, sectarian institutions. The State must maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion, and it cannot, by designing a program to promote the free exercise of religion, erode the limitations of the Establishment Clause. Committee for Public Education v. Nyquist, p. 756.

CONSTITUTIONAL LAW—Continued.

15. *Freedom of speech—Obscenity.*—Obscene material is not speech entitled to First Amendment protection. Paris Adult Theatre I v. Slaton, p. 49.

16. *Freedom of the press—Obscenity.*—Merely because it has no pictorial content, obscene material in book form is not entitled to First Amendment protection. A State may control commerce in such a book, even distribution to consenting adults, to avoid the deleterious consequences it can reasonably conclude (conclusive proof is not required) result from the continuing circulation of obscene literature. Kaplan v. California, p. 115.

17. *Obscene films—Prior restraint.*—The seizure by the sheriff, without the authority of a constitutionally sufficient warrant, was unreasonable under Fourth and Fourteenth Amendment standards. Seizure is not unreasonable simply because it would have been easy to secure a warrant, but rather because prior restraint of right of expression, whether by books or films, calls for higher hurdle of reasonableness. This case does not present an exigent circumstance in which police action must be "now or never" to preserve evidence of crime, and where it may be reasonable to permit action without prior judicial approval. Roaden v. Kentucky, p. 496.

18. *Obscene films—Safeguards.*—Where film is seized for bona fide purpose of preserving it as evidence in criminal proceeding, and it is seized pursuant to warrant issued after a determination of probable cause by a neutral magistrate, and following seizure a prompt judicial determination of obscenity issue is available, the seizure is constitutionally permissible. On showing to trial court that other copies of film are not available for exhibition, court should permit seized film to be copied so that exhibition can be continued pending judicial resolution of obscenity issue in an adversary proceeding. Otherwise, film must be returned. With such safeguards, a preseizure adversary hearing is not mandated by the First Amendment. Heller v. New York, p. 483.

19. *Obscene material—State regulation.*—Obscene material is not protected by the First Amendment. *Roth* v. *United States*, 354 U. S. 476, reaffirmed. A work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does not have serious literary, artistic, political, or scientific value. Miller v. California, p. 15.

20. *Want ads—Sex discrimination.*—The Pittsburgh ordinance as construed to forbid newspapers to carry sex-designated advertising

CONSTITUTIONAL LAW—Continued.

columns for non-exempt job opportunities does not violate petitioner's First Amendment rights. Pittsburgh Press Co. v. Human Rel. Comm'n, p. 376.

V. Fourth Amendment.

1. *Search and seizure—Automobile searches—Probable cause.*—Warrantless search of petitioner's automobile made without probable cause or consent, violated the Fourth Amendment. The search cannot be justified on basis of any special rules applicable to automobile searches, as probable cause was lacking; nor can it be justified by analogy with administrative inspections, as officers had no warrant or reason to believe that petitioner crossed the border, or committed an offense. The search was not a border search or the functional equivalent thereof. Almeida-Sanchez v. United States, p. 266.

2. *Search and seizure—Automobile searches—Reasonableness.*—The warrantless search of Ford did not violate Fourth Amendment as made applicable to States by the Fourteenth. The search was not unreasonable since police had exercised form of custody of the car, which constituted a hazard on the highway, and the disposition of which by respondent was precluded by his intoxicated and later comatose condition; and the revolver search was standard police procedure to protect public from a weapon's possibly falling into improper hands. Cady v. Dombrowski, p. 433.

3. *Search and seizure—Obscene films—Reasonableness.*—The seizure by the sheriff, without the authority of a constitutionally sufficient warrant, was unreasonable under Fourth and Fourteenth Amendment standards. Seizure is not unreasonable simply because it would have been easy to secure a warrant, but rather because prior restraint of right of expression, whether by books or films, calls for higher hurdle of reasonableness. This case does not present an exigent circumstance in which police action must be "now or never" to preserve evidence of crime, and where it may be reasonable to permit action without prior judicial approval. Roaden v. Kentucky, p. 496.

4. *Search and seizure—Warrant—Automobile search.*—Seizure of sock and floor mat from the Dodge was not invalid, since the Dodge, the item "particularly described," was subject of proper search warrant. It is not constitutionally significant that sock and mat were not listed in the warrant's return, which (contrary to the assumption of the Court of Appeals) was not filed prior to the search, and the warrant was thus validly outstanding at the time the articles were discovered. Cady v. Dombrowski, p. 433.

CONSTITUTIONAL LAW—Continued.

VI. Seventh Amendment.

Size of juries—Federal court rules.—Local federal court rule providing that a jury for the trial of civil cases shall consist of six persons comports with the Seventh Amendment requirement and the coextensive statutory requirement of 28 U. S. C. § 2072 that the right of trial by jury be preserved in suits at common law, and is not inconsistent with Fed. Rule Civ. Proc. 48 that deals only with parties' stipulations regarding jury size. Colgrove v. Battin, p. 149.

VII. Sixth Amendment.

Assistance of counsel—Post-indictment photographic display.—Sixth Amendment does not grant accused the right to have counsel present when Government conducts post-indictment photographic display, containing a picture of the accused, for purpose of allowing witness to attempt an identification of the offender. Pretrial event constitutes "critical stage" when accused requires aid in coping with legal problems or help in meeting his adversary. Since accused is not present at time of photographic display, and, as here, asserts no right to be present, there is no possibility that he might be misled by lack of familiarity with law or overpowered by his professional adversary. United States v. Ash, p. 300.

CONTEMPORARY COMMUNITY STANDARDS. See **Constitutional Law,** IV, 16, 19; **Obscenity,** 2–3, 7, 10, 14.

CONTRABAND. See **Constitutional Law,** I, 1–2; IV, 18–19; V, 1–2, 4; **Obscenity,** 1, 4, 6, 9.

CONTRIBUTIONS. See **Government Employees,** 5–6.

COPIES OF FILMS. See **Constitutional Law,** IV, 18; **Obscenity,** 4.

CORE CITY SCHOOLS. See **School Desegregation,** 1–3.

CORPORATION COMMISSION. See **Government Employees,** 5–6.

COUNSEL. See **Constitutional Law,** VII.

COURT RULES. See **Constitutional Law,** VI; **Juries.**

COURTS-MARTIAL. See also **Procedure,** 1.

Service-connected offenses—Retroactivity.—Denial of habeas corpus to petitioner in No. 71–6314, who was convicted of rape by court-martial, on ground that *O'Callahan* v. *Parker,* 395 U. S. 258, was not retroactive, is affirmed. Judgment in No. 71–1398, holding that *O'Callahan* was to be applied retroactively to serviceman who

COURTS-MARTIAL—Continued.
was convicted by court-martial on charges of unauthorized absence from duty station and theft of an automobile from a civilian, is reversed. Gosa v. Mayden, p. 665.

CRIMINAL LAW. See **Constitutional Law**, I, 1–2; IV, 18; V, 1–4; VII; **Courts-Martial**; **Evidence**, 1–2; **Obscenity**, 1–2, 4–7, 9, 12, 16; **Procedure**, 1, 3.

"CRITICAL STAGES." See **Constitutional Law**, VII.

CROSSING BORDERS. See **Constitutional Law**, I, 1; V, 1.

CUSTODY OF AUTOMOBILE. See **Constitutional Law**, V, 2.

CUSTOMS OFFICERS. See **Constitutional Law**, I, 1; V, 1; **Obscenity**, 9.

DECLARATORY JUDGMENTS. See **Appeals**; **Justiciability**; **National Guard**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

DEDUCTIONS. See **Taxes.**

DE JURE SEGREGATION. See **School Desegregation**, 1–3.

DELIBERATE SEGREGATION. See **School Desegregation**, 1–3.

DENVER. See **School Desegregation**, 1–3.

DEPARTMENT OF AGRICULTURE. See **Constitutional Law**, II, 1–2; **Food Stamp Act**, 1–2.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. See **Federal-State Relations**, 1–2; **Pre-emption**; **Social Security Act.**

DEPARTMENT OF JUSTICE. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

DEPENDENT CHILDREN. See **Constitutional Law**, II, 1; **Food Stamp Act**, 2.

DEPRIVATION OF RIGHT TO VOTE. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

DESEGREGATION OF SCHOOLS. See **Constitutional Law**, III, 3–4; IV, 6; **Relief**; **School Desegregation**, 1–3.

DIRECTOR OF CENSUS BUREAU. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

DISCRETION. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

DISCRIMINATION. See **Constitutional Law**, III, 3–4; IV, 6; **Relief**; **School Desegregation**, 1–3.

DISCRIMINATION IN EMPLOYMENT. See **Constitutional Law**, IV, 2, 20.

DISSEMINATION OF OBSCENE MATERIAL. See **Constitutional Law**, I, 2; IV, 16, 19; **Obscenity**, 1, 6–7.

DISTRICT COURTS. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

DRIVE-IN THEATERS. See **Constitutional Law**; IV, 17; V, 3; **Obscenity**, 5.

DRUNKEN DRIVING. See **Constitutional Law**, V, 2, 4.

DUAL SCHOOL SYSTEMS. See **School Desegregation**, 1–3.

DUE PROCESS. See **Constitutional Law**, II, 1–2; III, 5; **Food Stamp Act**; **Government Employees**, 2–6.

EDITORIAL JUDGMENT. See **Constitutional Law**, IV, 2, 20.

EDUCATIONAL ASSISTANCE. See **Constitutional Law**, III, 2–4; IV, 3–14; **Relief.**

EDUCATIONAL FACILITIES ACT. See **Constitutional Law**, IV, 11–12.

EDUCATIONAL INEQUITIES. See **School Desegregation**, 2.

ELECTIONS. See **Government Employees**, 1–2, 5–6.

ELIGIBILITY FOR FOOD STAMPS. See **Constitutional Law**, II, 2; **Food Stamp Act**, 1.

"EMPLOYABLE" PERSONS. See **Federal-State Relations**, 2; **Pre-emption**; **Social Security Act.**

EMPLOYEES. See **Constitutional Law**, III, 5; IV, 2, 20; **Government Employees**, 1–6.

EMPLOYMENT ADVERTISING. See **Constitutional Law**, IV, 2, 20.

ENTANGLEMENT IN RELIGION. See **Constitutional Law**, III, 2; IV, 3–5, 7–14.

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law**, II, 2; III, 1, 3–5; **Food Stamp Act**, 1; **Government Employees**, 3–4; **Relief**; **School Desegregation**, 2–3.

ESTABLISHMENT OF RELIGION CLAUSE. See **Constitutional Law**, III, 2; IV, 3–14.

EVIDENCE. See also **Constitutional Law,** IV, 18–19; V, 2, 4; **Obscenity,** 2–4; **School Desegregation,** 1–3.

1. *Obscenity—Books—Expert testimony.*—When, as in this case, material is itself placed in evidence, "expert" state testimony as to its allegedly obscene nature, or other ancillary evidence of obscenity, is not constitutionally required. Kaplan v. California, p. 115.

2. *Obscenity—Films—Expert evidence.*—It was not error not to require expert affirmative evidence of the films' obscenity, since the films (which were the best evidence of what they depicted) were themselves placed in evidence. Paris Adult Theatre I v. Slaton, p. 49.

EXAMINATIONS. See **Constitutional Law,** IV, 7.

EXCLUSIONS. See **Taxes.**

EXHIBITION OF FILMS. See **Constitutional Law,** IV, 17–18; V, 3; **Obscenity,** 4–5, 12, 16.

EXIGENT CIRCUMSTANCES. See **Constitutional Law,** IV, 17; V, 3; **Obscenity,** 5.

EX PARTE WARRANTS. See **Constitutional Law,** IV, 18; **Obscenity,** 4.

EXPENSES OF COMMUTING. See **Taxes.**

EXPERT EVIDENCE. See **Constitutional Law,** IV, 16, 18–19; **Evidence,** 1–2; **Obscenity,** 2–3.

EXTERNAL BOUNDARIES. See **Constitutional Law,** V, 1.

FACIAL UNCONSTITUTIONALITY. See **Government Employees,** 5.

FEDERAL COURT RULES. See **Constitutional Law,** VI; **Juries.**

FEDERAL EMPLOYEES. See **Government Employees,** 1–2.

FEDERAL RULES OF CIVIL PROCEDURE. See **Constitutional Law,** VI; **Juries.**

FEDERAL-STATE RELATIONS. See also **Constitutional Law,** III, 5; **Government Employees,** 3–4; **Pre-emption; Social Security Act.**

1. *Pre-emption—Social Security Act—New York Work Rules.*—Where coordinate state and federal efforts exist within a complementary administrative framework in the pursuit of common purposes, as here, the case for federal pre-emption is not persuasive. New York Dept. of Social Services v. Dublino, p. 405.

2. *Social Security Act—Pre-emption—New York Work Rules.*—The Work Incentive provisions of the Act do not pre-empt the Work

FEDERAL-STATE RELATIONS—Continued.

Rules of the New York State Welfare Law. Affirmative evidence exists to establish Congress' intention not to terminate all state work programs and foreclose future state cooperative programs. New York Dept. of Social Services v. Dublino, p. 405.

FEDERAL WORK INCENTIVE PROGRAM. See **Federal-State Relations,** 1–2; **Pre-emption; Social Security Act.**

FEES. See **Constitutional Law,** IV, 11–12.

FIFTH AMENDMENT. See **Constitutional Law,** II, 2; **Courts-Martial; Food Stamp Act,** 1; **Procedure,** 1.

FILMS. See **Constitutional Law,** IV, 17–18; V, 3; **Evidence,** 2; **Obscenity,** 3–5, 12, 16.

"FINAL RESTRAINT." See **Constitutional Law,** IV, 17–18; V, 3; **Obscenity,** 4–5.

FINANCIAL AID TO NONPUBLIC SCHOOLS. See **Constitutional Law,** III, 2–4; IV, 3–14.

FINANCING TRANSACTIONS. See **Constitutional Law,** IV, 11–12.

FIRST AMENDMENT. See **Constitutional Law,** IV, 1–20; **Evidence,** 1–2; **Obscenity,** 7; **Procedure,** 3; **Relief.**

FOOD STAMP ACT. See also **Constitutional Law,** II, 1–2.

1. *Low-income households—Unrelated persons—Due process.*—The legislative classification here involved, excluding households whose members are not "all related to each other," cannot be sustained, the classification being clearly irrelevant to stated purposes of the Act and not rationally furthering any other legitimate governmental interest. In practical operation, Act excludes not those who are "likely to abuse the program" but, rather, only those who so desperately need aid that they cannot even afford to alter their living arrangements so as to retain their eligibility. U. S. Dept. of Agriculture v. Moreno, p. 528.

2. *Needy households—Tax deductions—Due process.*—Tax deduction taken for benefit of parent in a prior year is not a rational measure of need of a different household with which the child of the tax-deducting parent lives, and the administration of the Act allows no hearing to show that the tax deduction is irrelevant to the need of the household. Section 5 (b) of the Act therefore violates due process. U. S. Dept. of Agriculture v. Murry, p. 508.

FORFEITURE ACTIONS. See **Constitutional Law,** IV, 17–18; V, 3; **Obscenity,** 4–5.

FOURTEENTH AMENDMENT. See **Constitutional Law,** III, 1–5; IV, 1–14, 17; V, 2–4; **Government Employees,** 3–4; **Obscenity,** 5; **Procedure,** 3; **Relief.**

FOURTH AMENDMENT. See **Constitutional Law,** IV, 17; V, 1–4; **Obscenity,** 5.

FREEDOM OF ASSEMBLY. See **Justiciability; National Guard.**

FREEDOM OF EXPRESSION. See **Constitutional Law,** IV, 1–2, 15–20; V, 3; **Obscenity,** 4–7.

FREEDOM OF SPEECH. See **Constitutional Law,** IV, 1–2, 15–20; V, 3; **Evidence,** 1–2; **Justiciability; National Guard; Obscenity,** 2, 6–7.

FREEDOM OF THE PRESS. See **Constitutional Law,** IV, 1–2, 16, 20; **Evidence,** 1; **Obscenity,** 6, 11.

FREE TEXTBOOKS. See **Constitutional Law,** III, 3–4; IV, 6; **Relief.**

GEORGIA. See **Constitutional Law,** IV, 15; **Evidence,** 2; **Obscenity,** 3, 8, 12, 16.

GOVERNMENT EMPLOYEES. See also **Constitutional Law,** III, 5.

1. *Hatch Act—Political activities of federal employees.*—Holding of *Public Workers* v. *Mitchell,* 330 U. S. 75, that federal employees can be prevented from holding party office, working at the polls, and acting as party paymaster for other party workers is reaffirmed. Congress can also constitutionally forbid federal employees from engaging in plainly identifiable acts of political management and political campaigning. CSC v. Letter Carriers, p. 548.

2. *Hatch Act—Political activities of federal employees—Civil Service Commission regulations.*—It is the Civil Service Commission's regulations regarding political activity, the legitimate descendants of the 1940 restatement adopted by the Congress, and, in most respects, the reflection of longstanding interpretations of the statute by the agency charged with its interpretation and enforcement, and the statute itself, that are the bases for rejecting the claim that the Act is unconstitutionally vague and overbroad. CSC v. Letter Carriers, p. 548.

3. *New York Civil Service Law—Citizenship.*—Section 53 of the Law violates the Equal Protection Clause of the Fourteenth Amendment since, in the context of New York's statutory civil service scheme, it sweeps indiscriminately and is not narrowly limited to the accomplishment of substantial state interests. The "special pub-

GOVERNMENT EMPLOYEES—Continued.

lic interest" doctrine has no applicability to this case. Sugarman v. Dougall, p. 634.

4. *New York Civil Service Law—Qualifications—Citizenship.*—While the State has an interest in defining its political community, and a corresponding interest in establishing the qualifications for persons holding state elective or important nonelective executive, legislative, and judicial positions, the broad citizenship requirement established by § 53 of the Law cannot be justified on this basis. Sugarman v. Dougall, p. 634.

5. *State of Oklahoma employees—Political activities.*—Section 818 of the Oklahoma merit system Act is not unconstitutional on its face, The statute, which gives adequate warning of what activities it proscribes and sets forth explicit standards for those who must apply it, is not impermissibly vague. Broadrick v. Oklahoma, p. 601.

6. *State of Oklahoma employees—Political activities—Overbreadth.*—Although appellants contend that the statute reaches activities that are constitutionally protected as well as those that are not, it is clearly constitutional as applied to conduct with which they are charged and because it is not substantially overbroad they cannot challenge statute on ground that it might be applied unconstitutionally to others, in situations not before the Court. Appellants' conduct falls squarely within the proscriptions of § 818 of the state merit system Act, which deals with activities the State has ample power to regulate, and the operation of the statute has been administratively confined to clearly partisan political activity. Broadrick v. Oklahoma, p. 601.

GUIDELINES. See **Constitutional Law,** IV, 18–19; V, 3; **Obscenity,** 4–5, 7, 10, 13–15, 17.

HARD-CORE PORNOGRAPHY. See **Constitutional Law,** I, 1–2; IV, 15–16, 19; **Evidence,** 1–2; **Obscenity,** 1–3, 6–7, 9, 14, 17.

HATCH ACT. See **Government Employees,** 1–2.

HEARINGS. See **Constitutional Law,** II, 1; IV, 18; **Food Stamp Act,** 2; **Obscenity,** 4.

"HELP-WANTED" ADVERTISEMENTS. See **Constitutional Law,** IV, 1–2, 20.

HIGHER EDUCATION FACILITIES. See **Constitutional Law,** IV, 11–12.

HISPANOS. See **School Desegregation,** 2.

HOUSEHOLDS. See **Constitutional Law**, II, 1–2; **Food Stamp Act**, 1–2.

HUMAN RESOURCES ADMINISTRATION. See **Constitutional Law**, III, 5; **Government Employees**, 3–4.

IDENTIFICATION OF ACCUSED. See **Constitutional Law**, VII.

IMMIGRATION AND NATIONALITY ACT. See **Constitutional Law**, III, 5; V, 1; **Government Employees**, 3–4.

IMMIGRATION AND NATURALIZATION. See **Constitutional Law**, III, 5; **Government Employees**, 3–4.

IMPORTATION OF OBSCENE MATTER. See **Constitutional Law**, I, 1–2; **Obscenity**, 1, 9.

INCOME TAXES. See **Constitutional Law**, II, 1; IV, 13; **Food Stamp Act**, 2; **Taxes.**

INCOME TAX RELIEF. See **Constitutional Law**, IV, 13.

INDICTMENT BY GRAND JURY. See **Courts-Martial**; **Procedure**, 1.

INJUNCTIONS. See **Constitutional Law**, III, 3–4; IV, 6; **Justiciability**; **National Guard**; **Relief.**

INSPECTION OF EDUCATIONAL FACILITIES. See **Constitutional Law**, IV, 11.

INTERNAL REVENUE CODE. See **Taxes.**

INTERSTATE COMMERCE. See **Constitutional Law**, I, 2; **Obscenity**, 1.

INTERVENTION. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

INVALIDITY OF STATUTE. See **Government Employees**, 1–2.

IRRATIONAL CLASSIFICATIONS. See **Constitutional Law**, II, 2; **Food Stamp Act**, 1.

JUDGES. See **Constitutional Law**, IV, 18; **Obscenity**, 4.

JUDICIAL DETERMINATION OF OBSCENITY. See **Constitutional Law**, IV, 18; **Obscenity**, 4, 11.

JUDICIAL FUNCTIONS. See **Constitutional Law**, IV, 18.

JUDICIAL REVIEW. See **Constitutional Law**, IV, 3–4, 6, 10; **Relief.**

JUDICIAL SURVEILLANCE. See **Justiciability**; **National Guard.**

JURIES. See also **Constitutional Law,** VI; **Obscenity,** 10.

Seventh Amendment—Six-man juries—Federal court rules.—Local federal court rule providing that a jury for the trial of civil cases shall consist of six persons comports with the Seventh Amendment requirement and the coextensive statutory requirement of 28 U. S. C. § 2072 that the right of trial by jury be preserved in suits at common law, and is not inconsistent with Fed. Rule Civ. Proc. 48 that deals only with parties' stipulations regarding jury size. Colgrove v. Battin, p. 149.

JURISDICTION. See **Courts-Martial; Procedure,** 1.

JURY TRIALS. See **Courts-Martial; Procedure,** 1.

JUSTICIABILITY. See also **National Guard.**

Kent State University—Civil disorders—Suit to restrain use of National Guard.—No justiciable controversy is presented in this case, as the relief sought by respondents, requiring initial judicial review and continuing judicial surveillance over the training, weaponry, and standing orders of the National Guard, embraces critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches. Gilligan v. Morgan, p. 1.

KENT STATE UNIVERSITY. See **Justiciability; National Guard.**

KENTUCKY. See **Constitutional Law,** IV, 17; V, 3; **Obscenity,** 5.

LACKING IN LITERARY VALUE. See **Constitutional Law,** IV, 19; **Obscenity,** 7, 14.

LAWYERS. See **Constitutional Law,** III, 1; VII.

LEASE-BACK ARRANGEMENTS. See **Constitutional Law,** IV, 11–12.

LEGISLATIVE FINDINGS. See **Constitutional Law,** IV, 3, 16.

LEGISLATIVE FUNCTIONS. See **Constitutional Law,** IV, 7–8, 10.

LEGISLATIVE PURPOSES. See **Constitutional Law,** IV, 3.

LEGITIMATE GOVERNMENTAL INTERESTS. See **Constitutional Law,** II, 2; **Food Stamp Act,** 1.

LIVING ARRANGEMENTS. See **Constitutional Law,** II, 1–2; **Food Stamp Act,** 1–2.

LOW-INCOME HOUSEHOLDS. See **Constitutional Law,** II, 2; **Food Stamp Act,** 1.

MAGAZINES. See **Obscenity**, 11; **Procedure**, 3.

MAINTENANCE AND REPAIR OF NONPUBLIC SCHOOLS. See **Constitutional Law**, IV, 5.

"MANDATED" SERVICES. See **Constitutional Law**, IV, 8, 10.

MARIHUANA. See **Constitutional Law**, V, 1.

MEMBERS OF HOUSEHOLD. See **Constitutional Law**, II, 2; **Food Stamp Act**, 1.

MERIT SYSTEMS. See **Government Employees**, 3–6.

MEXICANS. See **Constitutional Law**, V, 1.

MILITARY TRIBUNALS. See **Courts-Martial**; **Procedure**, 1.

MILITIA. See **Justiciability**; **National Guard.**

MISSISSIPPI. See **Constitutional Law**, III, 3–4; IV, 6; **Relief.**

MONTANA. See **Constitutional Law**, VI; **Juries.**

MOOTNESS. See **Justiciability**; **National Guard.**

MOTION PICTURE FILMS. See **Constitutional Law**, I, 1; IV, 17–18; V, 3; **Evidence**, 2; **Obscenity**, 3–5, 12, 16.

MOTION TO INTERVENE. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

MUNICIPAL BONDS. See **Constitutional Law**, IV, 11–12.

MUNICIPAL ORDINANCES. See **Constitutional Law**, IV, 1, 2, 20.

MURDER. See **Constitutional Law**, V, 2, 4.

NATIONAL GUARD. See also **Justiciability.**

Kent State University students—Suit to restrain use of Guard.—No justiciable controversy is presented in this case, as the relief sought by respondents, requiring initial judicial review and continuing judicial surveillance over the training, weaponry, and standing orders of the National Guard, embraces critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches. Gilligan v. Morgan, p. 1.

NATIONAL STANDARD. See **Constitutional Law**, IV, 16, 19; **Obscenity**, 6–7, 10, 13.

NEEDY HOUSEHOLDS. See **Constitutional Law**, II, 1–2; **Food Stamp Act**, 1–2.

NEGROES. See **School Desegregation**, 2.

NEIGHBORHOOD SCHOOL POLICY. See **School Desegregation**, 1.

NEUTRALITY. See **Constitutional Law**, IV, 3–5, 7–8, 10, 13–14.

NEUTRAL SERVICES. See **Constitutional Law**, IV, 7–8, 10.

NEWSPAPERS. See **Constitutional Law**, IV, 1–2, 20.

NEW YORK. See **Appeals**; **Constitutional Law**, III, 5; IV, 3–5, 7–8, 10, 13–14, 18; **Government Employees**, 3–4; **Obscenity**, 4, 15; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

NEW YORK EDUCATION LAW. See **Constitutional Law**, IV, 3–5, 7–8, 10, 14.

NEW YORK TAX LAW. See **Constitutional Law**, IV, 13.

NEW YORK WORK RULES. See **Federal-State Relations**, 1–2; **Pre-emption**; **Social Security Act.**

NONCITIZENS. See **Constitutional Law**, III, 1, 5; V, 1; **Government Employees**, 3–4.

NONIDEOLOGICAL SERVICES. See **Constitutional Law**, IV, 7–8, 10.

NONNEEDY HOUSEHOLDS. See **Constitutional Law**, II, 1–2; **Food Stamp Act**, 1–2.

NONPUBLIC SCHOOLS. See **Constitutional Law**, III, 2–4; IV, 3–14; **Relief.**

NONPUBLIC TRANSPORTATION. See **Constitutional Law**, I, 2; **Obscenity**, 1.

NONSECTARIAN SCHOOLS. See **Constitutional Law**, III, 2; IV, 9.

NONSECTARIAN USE. See **Constitutional Law**, IV, 11–12.

NONSERVICE-CONNECTED OFFENSES. See **Courts-Martial**; **Procedure**, 1.

OBSCENITY. See also **Constitutional Law**, I, 1–2; IV, 15–20; V, 3; **Evidence**, 1–2; **Procedure**, 3.

1. *Commerce—Congressional power—Privacy.*—Congress has the power to prevent obscene material, which is not protected by the First Amendment, from entering the stream of commerce. The zone of privacy that *Stanley* v. *Georgia*, 394 U. S. 557, protected does not extend beyond the home. United States v. Orito, p. 139.

2. *Evidence—Expert testimony.*—When, as in this case, material is itself placed in evidence, "expert" state testimony as to its alleg-

OBSCENITY—Continued.

edly obscene nature, or other ancillary evidence of obscenity, is not constitutionally required. Kaplan v. California, p. 115.

3. *Films—Expert evidence.*—It was not error to fail to require expert affirmative evidence of the films' obscenity, since the films (which were the best evidence of what they depicted) were themselves placed in evidence. Paris Adult Theatre I v. Slaton, p. 49.

4. *Films—Seizure pursuant to warrant—Preservation of evidence.*—Where film is seized for bona fide purpose of preserving it as evidence in criminal proceeding, and it is seized pursuant to warrant issued after a determination of probable cause by a neutral magistrate, and following seizure a prompt judicial determination of obscenity issue is available, the seizure is constitutionally permissible. On showing to trial court that other copies of film are not available for exhibition, court should permit seized film to be copied so that exhibition can be continued pending judicial resolution of obscenity issue in an adversary proceeding. Otherwise, film must be returned. With such safeguards, a preseizure adversary hearing is not mandated by the First Amendment. Heller v. New York, p. 483.

5. *Films—Warrantless seizure—Prior restraint.*—The seizure by the sheriff, without the authority of a constitutionally sufficient warrant, was unreasonable under Fourth and Fourteenth Amendment standards. Seizure is not unreasonable simply because it would have been easy to secure a warrant, but rather because prior restraint of right of expression, whether by books or films, calls for higher hurdle of reasonableness. This case does not present an exigent circumstance in which police action must be "now or never" to preserve evidence of crime, and where it may be reasonable to permit action without prior judicial approval. Roaden v. Kentucky, p. 496.

6. *First Amendment—No pictorial content.*—Merely because it has no pictorial content, obscene material in book form is not entitled to First Amendment protection. A State may control commerce in such a book, even distribution to consenting adults, to avoid the deleterious consequences it can reasonably conclude (conclusive proof is not required) result from the continuing circulation of obscene literature. Kaplan v. California, p. 115.

7. *First Amendment—State regulation.*—Obscene material is not protected by the First Amendment. *Roth* v. *United States*, 354 U. S. 476, reaffirmed. A work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, taken as a whole, does

OBSCENITY—Continued.

not have serious literary, artistic, political, or scientific value. Miller v. California, p. 15.

8. *Georgia civil procedure—Standards.*—The Georgia civil procedure followed here (assuming use of a constitutionally acceptable standard for determining the issue of obscenity *vel non*) comported with the standards of *Teitel Film Corp.* v. *Cusack,* 390 U. S. 139; *Freedman* v. *Maryland,* 380 U. S. 51; and *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436. Paris Adult Theatre I v. Slaton, p. 49.

9. *Importation of contraband—Commerce Clause—Personal use.*—Congress, which has broad powers under the Commerce Clause to prohibit importation into this country of contraband, may constitutionally proscribe the importation of obscene matter, notwithstanding that the material is for the importer's private, personal use and possession. United States v. 12 200-ft. Reels Film, p. 123.

10. *Juries—Community standard—National standard.*—The jury may measure the essentially factual issues of prurient appeal and patent offensiveness by the standard that prevails in the forum community, and need not employ a "national standard." Miller v. California, p. 15.

11. *Magazines—Obscenity adjudication—Remand.*—Judgment of Supreme Court of Virginia, affirming trial court's order adjudging certain magazines obscene and restraining their sale, is vacated and remanded for further proceedings consistent with *Miller* v. *California, ante,* p. 15; *Paris Adult Theatre I* v. *Slaton, ante,* p. 49; and *Heller* v. *New York, ante,* p. 483. Alexander v. Virginia, p. 836.

12. *Public exhibition—Privacy.*—Exhibition of obscene material in places of public accommodation is not protected by any constitutional doctrine of privacy. A commercial theater cannot be equated with a private home; nor is there here a privacy right arising from a special relationship, such as marriage. Nor can the privacy of the home be equated with a "zone" of "privacy" that follows a consumer of obscene materials wherever he goes. Paris Adult Theatre I v. Slaton, p. 49.

13. *Standards—State community standard.*—Appraisal of the nature of the book by the "contemporary community standards of the State of California" was an adequate basis for establishing whether the book here involved was obscene. Kaplan v. California, p. 115.

14. *State regulation—Guidelines.*—Basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct spe-

OBSCENITY—Continued.

cifically defined by applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary. Miller v. California, p. 15.

15. *State regulation—Guidelines.*—Case is remanded to afford state courts an opportunity to reconsider petitioner's substantive challenges in light of *Miller* v. *California, ante,* p. 15, and *Paris Adult Theatre I* v. *Slaton, ante,* p. 49, which establish guidelines for lawful state regulation of obscene material. Heller v. New York, p. 483.

16. *State regulation—Public exhibition—"Adult" theaters.*—States have a legitimate interest in regulating commerce in obscene material and its exhibition in places of public accommodation, including "adult" theaters. There is a proper state concern with safeguarding against crime and other arguably ill effects of obscenity by prohibiting the public or commercial exhibition of obscene material. Though conclusive proof is lacking, States may reasonably determine that a nexus does or might exist between antisocial behavior and obscene material, just as States have acted on unprovable assumptions in other areas of public control. Paris Adult Theatre I v. Slaton, p. 49.

17. *"Utterly without redeeming social value"—Constitutional standard.*—The test of *"utterly* without redeeming social value" articulated in *Memoirs* v. *Massachusetts,* 383 U. S. 413, is rejected as a constitutional standard. Miller v. California, p. 15.

OHIO. See **Justiciability; National Guard.**

OKLAHOMA. See **Government Employees,** 5–6.

ORDINANCES. See **Constitutional Law,** IV, 1–2, 20.

ORDINARY AND NECESSARY EXPENSES. See **Taxes.**

OVERBREADTH. See **Constitutional Law,** III, 5; IV, 19; **Government Employees,** 3–4, 6; **Obscenity,** 7.

PARENT REIMBURSEMENT ACT FOR NONPUBLIC EDUCATION. See **Constitutional Law,** III, 2; IV, 9.

PARENTS AND CHILDREN. See **Constitutional Law,** II, 1; **Food Stamp Act,** 2.

PARENTS OF NONPUBLIC SCHOOL STUDENTS. See **Constitutional Law,** III, 2–4; IV, 3–5, 9–10, 13–14.

PARTISAN ACTIVITIES. See **Government Employees,** 1–2, 5–6.

PARTY ACTIVITIES. See **Government Employees,** 1–2, 5–6.

PATENT OFFENSIVENESS. See **Constitutional Law**, I, 1–2; IV, 15–16, 19; **Obscenity**, 1–3, 6–7, 9, 14, 17.

PATTERN OF TRAINING. See **Justiciability; National Guard.**

PENDLETON ACT. See **Government Employees**, 1–2.

PENNSYLVANIA. See **Constitutional Law**, III, 2; IV, 9.

"PERSONAL" EXPENSES. See **Taxes.**

PHOTOGRAPHIC DISPLAYS. See **Constitutional Law**, VII.

PHOTOGRAPHS. See **Constitutional Law**, IV, 16; **Obscenity**, 2–3, 6.

PICTORIAL CONTENT. See **Constitutional Law**, IV, 16; **Evidence**, 1–2; **Obscenity**, 2–3, 6.

PILOTS. See **Taxes.**

PITTSBURGH PRESS. See **Constitutional Law**, IV, 1–2, 20.

POLICE OFFICERS. See **Constitutional Law**, V, 2, 4.

POLITICAL CAMPAIGNS. See **Government Employees**, 1–2, 5–6.

POLITICAL MANAGEMENT. See **Government Employees**, 1.

POLITICAL STRIFE. See **Constitutional Law**, IV, 4.

PORNOGRAPHY. See **Constitutional Law**, I, 1–2; IV, 15–16, 19; **Evidence**, 1–2; **Obscenity**, 1–3, 6–7, 9, 14, 17.

POST-INDICTMENT PHOTOGRAPHIC DISPLAYS. See **Constitutional Law**, VII.

PRACTICE OF LAW. See **Constitutional Law**, III, 1.

PRE-EMPTION. See also **Federal-State Relations**, 1–2; **Social Security Act.**

Social Security Act—Work Incentive Program—New York Work Rules.—The Work Incentive provisions of the Act do not pre-empt the Work Rules of the New York Social Welfare Law. Where coordinate state and federal efforts exist within a complementary administrative framework in the pursuit of common purposes, as here, the case for federal pre-emption is not persuasive. New York Dept. of Social Services v. Dublino, p. 405.

PRESENCE OF ACCUSED. See **Constitutional Law**, VII.

PRESERVATION OF EVIDENCE. See **Constitutional Law**, IV, 18; **Obscenity**, 4.

PRESUMPTIONS. See **Constitutional Law**, II, 2; **Food Stamp Act**, 1.

PRIOR JUDICIAL APPROVAL. See **Constitutional Law**, IV, 17–18; V, 3; **Obscenity**, 4–5.

PRIOR RESTRAINT. See **Constitutional Law**, IV, 17; V, 3; **Obscenity**, 5.

PRIVACY. See **Constitutional Law**, I, 1–2; **Evidence**, 1–2; **Obscenity**, 1–3, 9, 12.

PRIVATE SCHOOLS. See **Constitutional Law**, III, 2–4; IV, 3–14; **Relief.**

PRIVATE USE. See **Constitutional Law**, I, 1–2; **Obscenity**, 1, 9.

PROBABLE CAUSE. See **Constitutional Law**, V, 1.

PROCEDURE. See also **Appeals**; **Constitutional Law**, IV, 6–7, 12, 14, 18; **Courts-Martial**; **Juries**; **Justiciability**; **National Guard**; **Obscenity**, 4, 8, 11; **Relief**; **Voting Rights Act of 1965.**

1. *Courts-martial — Service-connected offenses — Retroactivity.*— Denial of habeas corpus to petitioner in No. 71–6314, who was convicted of rape by court-martial, on ground that *O'Callahan* v. *Parker*, 395 U. S. 258, was not retroactive, is affirmed. Judgment in No. 71–1398, holding that *O'Callahan* was to be applied retroactively to serviceman who was convicted by court-martial on charges of unauthorized absence from duty station and theft of an automobile from a civilian, is reversed. Gosa v. Mayden, p. 665.

2. *Motion to intervene—Untimeliness—Discretion of District Court.*—The motion to intervene was untimely, and in the light of that fact and all the other circumstances of this case, the District Court did not abuse its discretion in denying the motion. NAACP v. New York, p. 345.

3. *Obscenity trial—Civil action—Trial by jury.*—Judgment of Supreme Court of Virginia, affirming trial court's order adjudging certain magazines obscene and restraining their sale, is vacated and remanded for further proceedings consistent with *Miller* v. *California*, *ante*, p. 15; *Paris Adult Theatre I* v. *Slaton*, *ante*, p. 49; and *Heller* v. *New York*, *ante*, p. 483. Trial by jury is not constitutionally required in this civil action pursuant to Va. Code Ann. § 18.1–236.3. Alexander v. Virginia, p. 836.

4. *Voting Rights Act of 1965—Appeals—Unsuccessful intervenors.*—The words "any appeal" in § 4 (a) of the Act encompass an appeal by a would-be, but unsuccessful, intervenor, and appellants' appeal properly lies to this Court. NAACP v. New York, p. 345.

PROFESSIONAL STANDARDS. See **Constitutional Law**, III, 1.

PROMPT JUDICIAL DETERMINATION. See **Constitutional Law,** IV, 18; **Obscenity,** 4.

PROOF. See **Constitutional Law,** IV, 18–19; **Evidence,** 1–2; **Obscenity,** 4, 10, 13–14, 17.

PROSPECTIVITY. See **Courts-Martial; Procedure,** 1.

PUBLIC ASSISTANCE RECIPIENTS. See **Federal-State Relations,** 1–2; **Pre-emption; Social Security Act.**

PUBLIC EMPLOYEES. See **Constitutional Law,** III, 5; **Government Employees,** 1–6.

PUBLIC SCHOOLS. See **Constitutional Law,** III, 3; IV, 5; **Relief; School Desegregation,** 1–3.

PUBLIC TRANSPORTATION. See **Constitutional Law,** I, 2; **Obscenity,** 1.

QUALIFICATIONS. See **Constitutional Law,** III, 1, 5; **Government Employees,** 3–4.

QUALIFICATIONS FOR VOTING. See **Appeals; Procedure,** 2, 4; **Voting Rights Act of 1965.**

RACIAL DISCRIMINATION. See **Constitutional Law,** III, 3–4; IV, 6; **Relief.**

RACIAL SEGREGATION. See **School Desegregation,** 1–3.

RAPE. See **Courts-Martial; Procedure,** 1.

REASONABLE DISTANCES. See **Constitutional Law,** V, 1.

REASONABLENESS. See **Constitutional Law,** IV, 16–17; V, 2–3; **Obscenity,** 5–6.

RECORDKEEPING. See **Constitutional Law,** IV, 7–8.

REGULATIONS. See **Constitutional Law,** V, 1; **Government Employees,** 1–2.

REIMBURSEMENT OF TUITION EXPENSES. See **Constitutional Law,** IV, 3, 9, 14.

REIMBURSING PRIVATE SCHOOLS. See **Constitutional Law,** IV, 7–8, 10.

RELIEF. See also **Constitutional Law,** III, 3–4; IV, 6; **Justiciability; National Guard; School Desegregation,** 2.

Private schools—Mississippi textbook loan program—Certification procedure.—Proper injunctive relief can be granted without implying that all private schools alleged to be receiving textbook aid have

RELIEF—Continued.

restrictive admission policies. District Court can direct appellees to submit for approval a certification procedure whereby schools may apply for textbooks on behalf of pupils, affirmatively declaring admission policies and practices, and stating number of their racially and religiously identifiable minority students and other relevant data. Certification of eligibility will be subject to judicial review. Norwood v. Harrison, p. 455.

RELIGIOUS-AFFILIATED COLLEGES. See **Constitutional Law**, IV, 11–12.

RELIGIOUS INSTRUCTIONS. See **Constitutional Law**, III, 2; IV, 3–5, 7–8, 10, 13.

RELIGIOUS SCHOOLS. See **Constitutional Law**, III, 2; IV, 3–5, 9.

REMANDS. See **Obscenity**, 11, 15; **Procedure**, 3.

RESIDENT ALIENS. See **Constitutional Law**, III, 1, 5; **Government Employees**, 3–4.

RES JUDICATA. See **Courts-Martial**; **Procedure**, 1.

RESTRAINT OF EXPRESSION. See **Constitutional Law**, IV, 17; V, 3; **Obscenity**, 5.

RETROACTIVITY. See **Courts-Martial**; **Procedure**, 1.

RETURN OF WARRANT. See **Constitutional Law**, V, 2, 4.

REVENUE BONDS. See **Constitutional Law**, IV, 11–12.

REVOLVERS. See **Constitutional Law**, V, 2, 4.

RIGHT TO COUNSEL. See **Constitutional Law**, VII.

RIGHT TO VOTE. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

RULES OF CIVIL PROCEDURE. See **Constitutional Law**, VI; **Juries.**

SCHOOL BOARDS. See **School Desegregation**, 1, 3.

SCHOOL DESEGREGATION. See also **Constitutional Law**, III, 3–4; IV, 6.

1. *Policy of intentional segregation—Burden of proof.*—Where, as here, policy of intentional segregation has been proved with respect to a significant portion of the school system, burden is on school authorities (regardless of claims that their "neighborhood school policy" was racially neutral) to prove that their actions as to other segregated schools in the system were not likewise motivated by a

SCHOOL DESEGREGATION—Continued.

segregative intent. Keyes v. School District No. 1, Denver, Colo., p. 189.

2. *Segregated schools—Educational inequities—Negroes and Hispanos.*—District Court, for purposes of defining a "segregated" core city school, erred in not placing Negroes and Hispanos in the same category since both groups suffer the same educational inequities when compared with the treatment afforded Anglo students. Keyes v. School District No. 1, Denver, Colo., p. 189.

3. *Segregation of core city schools—Deliberate policy.*—Courts below did not apply correct legal standard in dealing with petitioners' contention that respondent School Board had the policy of deliberately segregating the core city schools. Proof that school authorities have pursued an intentional segregative policy in a substantial portion of school district will support a finding by trial court of the existence of dual system, absent a showing that the district is divided into clearly unrelated units. Keyes v. School District No. 1, Denver, Colo., p. 189.

SCHOOLS. See **Constitutional Law**, III, 2–4; IV, 3–14; **School Desegregation**, 1–3.

SCHOOL TEXTBOOKS. See **Constitutional Law**, III, 3–4; IV, 6; **Relief.**

SEARCH AND SEIZURE. See **Constitutional Law**, V, 1–4.

SEARCH WARRANTS. See **Constitutional Law**, V, 2, 4.

SECRETARY OF AGRICULTURE. See **Constitutional Law**, II, 1–2; **Food Stamp Act**, 1–2.

SECTARIAN COLLEGES. See **Constitutional Law**, IV, 11–12.

SECTARIAN SCHOOLS. See **Constitutional Law**, III, 2; IV, 3–5, 7–10, 13–14.

SECULAR PURPOSES. See **Constitutional Law**, IV, 11–12.

SECULAR SERVICES. See **Constitutional Law**, IV, 10.

SEGREGATED SCHOOLS. See **Constitutional Law**, III, 3–4; IV, 6; **Relief**; **School Desegregation**, 1–3.

SEIZURE OF FILMS. See **Constitutional Law**, IV, 17–18; V, 3; **Obscenity**, 4–5.

SERVICE-CONNECTED OFFENSES. See **Courts-Martial**; **Procedure**, 1.

SERVICEMEN. See **Courts-Martial; Procedure,** 1.

SERVICES OF PRIVATE SCHOOLS. See **Constitutional Law,** IV, 8, 10.

SEVENTH AMENDMENT. See **Constitutional Law,** VI; **Juries.**

SEVERABILITY OF STATUTE. See **Constitutional Law,** III, 2.

SEX-DESIGNATED WANT AD COLUMNS. See **Constitutional Law,** IV, 1–2, 20.

SEX DISCRIMINATION. See **Constitutional Law,** IV, 1–2, 20.

SEXUALLY EXPLICIT MATERIAL. See **Constitutional Law,** IV, 19; **Obscenity,** 7, 14.

SHERIFFS. See **Constitutional Law,** IV, 17; V, 3; **Obscenity,** 5.

SIX-MAN JURIES. See **Constitutional Law,** VI; **Juries.**

SIXTH AMENDMENT. See **Constitutional Law,** VII; **Courts-Martial; Procedure,** 1.

SIZE OF JURIES. See **Constitutional Law,** VI; **Juries.**

SOCIAL SECURITY ACT. See also **Federal-State Relations,** 1–2; **Pre-emption.**

Work Incentive Program—New York Work Rules—Pre-emption.— The Work Incentive (WIN) provisions of the Act do not pre-empt New York Work Rules of the New York Social Welfare Law. There is no substantial evidence that Congress intended, either expressly or impliedly, to pre-empt state work programs. More is required than the apparent comprehensiveness of the WIN legislation to show the "clear manifestation of [congressional] intention" that must exist before a federal statute is held "to supersede the exercise" of state action. New York Dept. of Social Services v. Dublino, p. 405.

SOCIAL VALUE. See **Constitutional Law,** IV, 19; **Obscenity,** 7, 14.

SOCIAL WELFARE LAW. See **Federal-State Relations,** 1–2; **Pre-emption; Social Security Act.**

SOUTH CAROLINA. See **Constitutional Law,** IV, 11–12.

"SPECIAL PUBLIC INTEREST" DOCTRINE. See **Constitutional Law,** III, 5; **Government Employees,** 3–4.

STAMP PROGRAMS. See **Constitutional Law,** II, 1–2; **Food Stamp Act,** 1–2.

STANDARDS. See **Constitutional Law,** IV, 19; **Evidence,** 1–2; **Obscenity,** 2–3, 7, 10, 13–14.

STATE CIVIL SERVICE. See **Constitutional Law**, III, 5; **Government Employees**, 3–6.

STATE COMMUNITY STANDARDS. See **Constitutional Law**, IV, 16, 19; **Evidence**, 1–2; **Obscenity**, 10, 13.

STATE EMPLOYEES. See **Government Employees**, 3–6.

STATE PERSONNEL BOARD. See **Government Employees**, 5–6.

STATE TAX RELIEF. See **Constitutional Law**, IV, 13.

STATE TEXTBOOK LOAN PROGRAM. See **Constitutional Law**, III, 3–4; IV, 6; **Relief.**

STATE UNIVERSITIES. See **Justiciability**; **National Guard.**

STATE WORK PROGRAMS. See **Federal-State Relations**, 1–2; **Pre-emption**; **Social Security Act.**

STIPULATIONS. See **Constitutional Law**, VI; **Juries.**

STUDENTS. See **Constitutional Law**, III, 3–4; IV, 6; **Justiciability**; **National Guard**; **Relief.**

SUBSTANTIAL STATE INTERESTS. See **Constitutional Law**, III, 5; **Government Employees**, 3–4.

SUMMARY JUDGMENTS. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

SUPERVISORY RELIEF. See **Justiciability**; **National Guard.**

SUPPORTING RELIGION-ORIENTED SCHOOLS. See **Constitutional Law**, III, 2; IV, 3–5, 9, 13–14.

SUPREMACY CLAUSE. See **Constitutional Law**, III, 5; **Government Employees**, 3–4.

SUPREME COURT. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

SUSPECT CLASSIFICATIONS. See **Constitutional Law**, III, 1.

TAX DEDUCTIONS. See **Constitutional Law**, II, 1; **Food Stamp Act**, 2; **Taxes.**

TAXES.

Income taxes—Deduction of business expenses—Commuting expenses.—Airline pilot taxpayer is not entitled under § 262 of the Internal Revenue Code to an exclusion from "personal" expenses for the costs of commuting by car from his home to his place of employment because by happenstance he must carry incidentals of his occupation with him. Fausner v. Commissioner, p. 838.

TAX-EXEMPT BONDS. See **Constitutional Law**, IV, 11–12.

TAX RELIEF. See **Constitutional Law**, IV, 3–4, 13.

TEACHER-PREPARED TESTS. See **Constitutional Law**, IV, 7.

TESTS OR DEVICES. See **Appeals**; **Constitutional Law**, IV, 7; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

TEXTBOOKS. See **Constitutional Law**, III, 3–4; IV, 6; **Relief.**

THEATERS. See **Constitutional Law**, IV, 15, 17–18; V, 3; **Obscenity**, 4–5, 8, 12, 16.

THOUGHT CONTROL. See **Constitutional Law**, IV, 15, 17, 19; V, 3; **Evidence**, 1–2; **Obscenity**, 8.

TIMELINESS. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

TRAINING OF NATIONAL GUARD. See **Justiciability**; **National Guard.**

TRANSPORTING INCIDENTALS OF OCCUPATION. See **Taxes.**

TRANSPORTING OBSCENE MATERIAL. See **Constitutional Law**, I, 1–2; **Obscenity**, 1, 9.

TRIAL BY JURY. See **Constitutional Law**, VI; **Courts-Martial**; **Juries**; **Obscenity**, 10; **Procedure**, 1, 3.

TRIAL IN VICINAGE. See **Courts-Martial**; **Procedure**, 1.

TUITION EXPENSES. See **Constitutional Law**, IV, 9.

TUITION-REIMBURSEMENT PLANS. See **Constitutional Law**, IV, 3, 9, 14.

UNITED STATES CITIZENS. See **Constitutional Law**, III, 1, 5; **Government Employees**, 3–4.

UNIVERSITY STUDENTS. See **Justiciability**; **National Guard.**

UNPROVABLE ASSUMPTIONS. See **Constitutional Law**, IV, 16; **Evidence**, 1–2; **Obscenity**, 2–3, 6.

UNRELATED PERSONS. See **Constitutional Law**, II, 2; **Food Stamp Act**, 1.

UNSUCCESSFUL INTERVENORS. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

UNTIMELINESS. See **Appeals**; **Procedure**, 2, 4; **Voting Rights Act of 1965.**

UNWILLING RECIPIENTS. See **Constitutional Law**, IV, 19; **Obscenity**, 7, 10, 14.

"USE OF FORCE" RULES. See **Justiciability; National Guard.**

UTTERLY WITHOUT REDEEMING SOCIAL VALUE. See **Constitutional Law,** IV, 16, 19; **Evidence,** 1–2; **Obscenity,** 2–3, 6, 14, 17.

VAGUENESS. See **Government Employees,** 5–6.

VICINAGE. See **Courts-Martial; Procedure,** 1.

VIRGINIA. See **Obscenity,** 11; **Procedure,** 3.

VOTING RIGHTS ACT OF 1965. See also **Appeals; Procedure,** 2, 4.

Appeals—Unsuccessful intervenors.—The words "any appeal" in § 4 (a) of the Act encompass an appeal by a would-be, but unsuccessful, intervenor, and appellants' appeal properly lies to this Court. NAACP v. New York, p. 345.

WANT ADS. See **Constitutional Law,** IV, 1–2, 20.

WARRANTLESS SEARCHES. See **Constitutional Law,** V, 1–4.

WARRANTLESS SEIZURES. See **Constitutional Law,** V, 1–4; **Obscenity,** 5.

WARRANTS. See **Constitutional Law,** V, 1–4; **Obscenity,** 5.

WARTIME OFFENSES. See **Courts-Martial; Procedure,** 1.

WEAPONS. See **Constitutional Law,** V, 2, 4.

WELFARE. See **Federal-State Relations,** 1–2; **Pre-emption; Social Security Act.**

WISCONSIN. See **Constitutional Law,** V, 2, 4.

WITNESSES. See **Constitutional Law,** VII.

WORK INCENTIVE PROGRAM. See **Federal-State Relations,** 1–2; **Pre-emption; Social Security Act.**

WORK PERMITS. See **Constitutional Law,** V, 1.

WORK PROGRAMS. See **Federal-State Relations,** 1–2; **Pre-emption; Social Security Act.**

WOULD-BE INTERVENORS. See **Appeals; Procedure,** 2, 4; **Voting Rights Act of 1965.**

ZONE OF PRIVACY. See **Constitutional Law,** I, 1–2; **Obscenity,** 1, 9, 12.

U. S. GOVERNMENT PRINTING OFFICE : 1975 O - 507-137